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In The
Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. After Congress withheld the extraordinary eminent domain power of immediate possession of private property from private gas companies under the Natural Gas Act, 15 U.S.C. § 717 et. seq., did the district court violate the constitutional separation of powers and usurp the exclusive authority of Congress to delegate the powers of eminent domain when the district court issued an injunction granting East Tennessee Natural Gas Company immediate possession of individuals' property and provided the gas company with federal marshals to enforce possession of the property without further hearing?

PARTIES TO THE PROCEEDING

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Respondent:

East Tennessee Natural Gas Company

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PETITION FOR WRIT OF CERTIORARI

Petitioners, listed above, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned matter on March 22, 2004.

OPINIONS AND ORDERS BELOW

The March 22, 2004 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 361 F.3d 808 (4th Cir. 2004) and reprinted in the Appendix ("App.") at 1a. The May 14, 2004 en banc judgment and order of the United States Court of Appeals for the Fourth Circuit denying the Petitioners' Petition for Rehearing is reported at 369 F.3d 357 (4th Cir. 2004) and reprinted in the App. at 65a. The July 9, 2003 order of the United States Court of Appeals for the Fourth Circuit denying Petitioners' Motion for Stay and granting Petitioners' Motion to Expedite Appeal is printed in the App. at 36a. The June 6, 2003 supplemental memorandum opinion of the United States District Court for the Western District of Virginia is printed in the App. at 38a. The May 30, 2003 order of the United States District Court for the Western District of Virginia is printed in the App. at 43a. The May 8, 2003 memorandum opinion of the United States District Court for the Western District of Virginia is printed in the App. at 46a.

JURISDICTION

The Petitioners seek review of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit that was entered in this action on March 22, 2004. The en banc judgment denying the landowners' request for a rehearing was entered on May 14, 2004. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. I, § 1

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Pursuant to this Court's Rule 14.1(f), the following provisions are set forth in the Appendix:

10 U.S.C. § 2538 in App. at 76a.
10 U.S.C. § 2663 in App. at 78a.
15 U.S.C. § 717f (Natural Gas Act) in App. at 79a (15 U.S.C. § 717f(h), the provision dealing specifically with eminent domain, is in App. at 83a).
16 U.S.C. § 425a in App. at 84a.
16 U.S.C. § 430k in App. at 85a.
28 U.S.C. § 1254 in App. at 86a.
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STATEMENT OF THE CASE

In December of 2002, the Respondent, East Tennessee Natural Gas Company ("ETNG") filed complaints for condemnation in the United States District Court for the Western District of Virginia ("district court"), pursuant to the Natural Gas Act, 15 U.S.C. § 717 et. seq. ("NGA"),

seeking to take property owned by the Petitioners ("landowners"). At the same time, ETNG moved the district court to issue an injunction giving ETNG immediate possession of the landowners' property before trial on just compensation and before the payment of compensation as determined at trial. The district court found that the NGA did not provide ETNG with authority to take immediate possession of the landowners' property and that Congress has not delegated private gas companies authority to take immediate possession of property. (App. at 39a).

Despite finding that Congress has not delegated the power to take immediate possession of property (the "quick-take" power) to ETNG, the district court granted ETNG immediate possession of the landowners' property and provided federal marshals to ETNG to enforce the transfer of possession. (App. at 44a). Armed federal marshals went with ETNG employees to the landowners' homes to enforce the grant of immediate possession that the district court created for ETNG. The marshals, at the direction of ETNG, patrolled the landowners' property and has maintained a constant presence throughout construction.

On June 9, 2003, the landowners appealed to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1292 and, shortly thereafter, moved to stay the district court's ruling pending appeal. The Fourth Circuit denied the Motion to Stay on July 9, 2003. (App. at 36a-37a). On September 25, 2003, the Fourth Circuit heard oral argument on the issue of whether the district court erred in judicially granting the quick-take power to a private company and providing federal marshals to enforce a power that Congress withheld from private gas companies. On March 22, 2004, the Fourth Circuit affirmed the district court's decision. (App. at 1a-35a). The landowners' timely Petition for Rehearing en banc was denied in a published

order issued on May 14, 2004. (App. at 65a-74a). Thereafter, the landowners filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The issue in this case is whether district courts may use "inherent" equitable powers to delegate to private parties extraordinary powers of eminent domain that are vested in Congress when Congress has decided to withhold these powers from private gas companies. Eminent domain is a legislative power that is vested in Congress. Congress determines who will exercise the power and how the power will be exercised. Eminent domain has been called a sovereign's "most awesome grant of power." Winger v. Aires, 89 A.2d 521, 522 (Pa. 1952). Thus, to keep that "awesome" power in check, when Congress delegates the power of eminent domain, the statutes are strictly construed to exclude those powers not expressly granted.

The district court acknowledged that Congress has not granted private gas companies the extraordinary quick-take power.[1] Contrary to its own interpretation of the law, the district court invoked its "inherent" equitable powers to grant ETNG the quick-take power that Congress withheld and compounded its error by providing armed federal marshals to seize and maintain control of the land for the benefit of ETNG. Such judicial fiat violates the constitutional separation of powers and eschews all limits on the "inherent" equitable powers of district courts.

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[1] The quick-take power is an extraordinary power of eminent domain that is additional to the ordinary power of eminent domain. It authorizes condemnors to seize possession of a landowner's property before providing the landowner with just compensation.

The Fourth Circuit's opinion upholding such judicial action will have grave and far-reaching implications spanning far beyond the purview of eminent domain. The opinion erodes the constitutional structure of government. The opinion poses a serious threat to the rights and liberties of individuals because it authorizes district judges to grant extraordinary legislative powers to private parties despite Congress's decision to withhold such powers from private parties.

The Fourth Circuit's decision creates direct conflict with the Seventh Circuit's decision in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998). See supra § II.

I. The Fourth Circuit's Holding that a District Court May Use Its "Inherent" Equitable Powers to Grant Private Parties Legislative Powers Belonging to Congress Violates the Constitutional Separation of Powers

A. The Fourth Circuit's Decision Erroneously Overlooks the Fundamental Principle of Separation of Powers and Fails to Address Whether the District Court's Exercise of "Inherent" Equitable Powers Violates the Doctrine of Separation of Powers

The Fourth Circuit ignored the constitutional doctrine of separation of powers. Consequently, it issued an opinion that violates this essential structural protection against excessive and arbitrary power. See Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (the purpose of separation of powers is to "diffuse power the better to secure liberty"). The separation of powers among three coordinate branches of government is a vital structural protection in our constitutional system of government. United States v. Brown, 381 U.S. 437, 442-43 (1965) (separation of powers is "a bulwark against tyranny"). "The doctrine of separation of

powers was not mere theory; it was felt necessity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring). It "is fundamental in our system." Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949).

The "constitutionally mandated division of authority [i.e., separation of powers and federalism] was adopted by the Framers to ensure protection of our fundamental liberties [and] to prevent the accumulation of excessive power in any one branch." United States v. Lopez, 514 U.S. 549, 552 (1995). "To preserve . . . and maintain the separation of powers, the carefully defined limits on the power of each branch must not be eroded." INS v. Chadha, 462 U.S. 919, 957-58 (1983). This Court has repeatedly affirmed that the Constitution forbids one branch of government from undermining and usurping the powers of another. Muskrat v. United States, 219 U.S. 346, 352 (1911).

Even in times of crisis and emergency, this Court has not let the exigencies of the crisis prevent the Court from enforcing the separation of powers that is at the center of the constitutional framework. Youngstown, 343 U.S. at 582-89. However, over the landowners' vigorous objections, both the district court and the Fourth Circuit ignored the separation of powers and failed to address this critical issue. The Fourth Circuit's opinion authorizes district courts to take extraordinary actions that erode the constitutional separation of powers for the benefit of a private party.

B. The District Court Unconstitutionally Usurped Exclusive Congressional Authority When It Unilaterally Granted ETNG the Quick-Take Power of Eminent Domain and Provided Federal Marshals to Enforce the Grant

Congress withheld the quick-take power from private companies such as ETNG, and the dictates of separation of

powers prohibit district courts from unilaterally granting these powers to private gas companies. The United States Constitution vests "[a]ll legislative Powers . . . in . . . Congress." U.S. Const. Art. I, § 1. Eminent domain is a legislative power that belongs to Congress. See Youngstown, 343 U.S. at 585-589; see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987); 1 William Blackstone, Commentaries *139-40 (explaining that "the legislature alone" controls and directs the power of eminent domain and that "nothing but the legislature can perform [this power"]).

Congress controls and directs the exercise of the power of eminent domain. Youngstown, 343 U.S. at 585-589. Congress determines who will exercise the power, and Congress determines how a party will exercise the power. Id.; see also 26 Am. Jur. 2d Eminent Domain § 5 (1996) (collecting cases) (explaining that "under the separation of governmental powers . . . it is the province of the legislature to prescribe how and by whom the power of eminent domain is to be exercised").

When Congress delegates powers of eminent domain either to governmental bodies or to private companies, the "statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted." N. Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170, 172 (D.N.D. 1981) (interpreting the NGA). Moreover, condemnors must exercise the power of eminent domain in strict compliance with the procedures and methods the legislature prescribes. Cincinnati v. Vester, 281 U.S. 439, 448 (1930). These principles have been found in the most elementary of texts.

> Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner, because the power of eminent domain is one of the most harsh proceedings known to the law. Such statutes are not to be extended or broadened by inference or implication or by judicial construction. . . . and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. . . . [W]hen the matter is doubtful, it must be resolved in favor of the property owner.

26 Am. Jur. 2d Eminent Domain § 20 (1996) (footnotes omitted) (emphasis added) (collecting cases).

Congress may delegate eminent domain power to governmental bodies or to an arm of the sovereign to take property on behalf of or in the name of the sovereign. Congress may also delegate such power to a private party who may take property for and on behalf of itself. Delegations of eminent domain power to private parties, however, "are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied." United States v. Carmack, 329 U.S. 230, 243 n.13 (1946).

Additionally, there are two distinct types of eminent domain power: (1) the ordinary power of eminent domain, also referred to as "straight condemnation," and (2) the extraordinary quick-take power of eminent domain. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 3-6 (1984) (discussing powers of eminent domain and stating that the United States government or Congress may take immediate possession of property); see also United States v. 640.00 Acres, 756 F.2d 842, 844 (11th Cir. 1985). A condemnor possessing the ordinary power of eminent

domain is authorized to take possession of property only after trial and payment to the landowner of just compensation as determined at trial.[2] Kirby Forest, 467 U.S. at 3-6. A condemnor possessing quick-take power is authorized to seize property before trial and before the condemnor provides just compensation to the landowner.[3] Id.

The extraordinary quick-take authority is separate from and in addition to the ordinary power of eminent domain. See 40 U.S.C. § 3118 (2004) ("The right to take possession and title in advance of final judgment in condemnation proceedings as provided by [40 U.S.C. § 3114] is in addition to any right, power, or authority conferred by [other] laws."); (App. at 93a).

Consistent with the constitutional structure of government that vests all legislative power in Congress and in accord with general legal principles of eminent domain, Congress, not the judiciary, determines whether to grant the extraordinary quick-take power or only the ordinary power of eminent domain. Youngstown, 343 U.S. at 582-589. With few exceptions, Congress has been careful to reserve the extraordinary quick-take power to the sovereign. See, e.g., United States v. Dow, 357 U.S. 17, 21 (1958) (explaining that "the Government may either employ statutes which require it to pay over judicially determined compensation before it can enter upon the land, or proceed under other statutes which enable it to take immediate possession") (emphasis added); see also Kirby Forest, 467 U.S. at 4-6 (stating that the

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[2] At the conclusion of the condemnation trial, the condemnor obtains an option to buy the property at the price determined at trial to be just compensation. Id. Upon payment of compensation, title vests in the condemnor, and the condemnor may take possession of the property.

[3] The condemnor deposits into court an amount it unilaterally believes to be just compensation and thereafter takes immediate possession of a landowner's property. Kirby Forest, 467 U.S. at 3-6.

government and Congress may seize possession of property before providing just compensation).

In this case, Congress has not granted ETNG the quick-take power. All parties, the district court, and the Fourth Circuit agree that Congress has not granted this extraordinary power to private gas companies. East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808, 820, 822-23 (4th Cir. 2004); (App. at 15a, 19a). It is precisely because Congress withheld this power that ETNG asked the district court to invoke and exercise "inherent" equitable powers for its benefit.

Although a number of district courts have impermissibly invoked "inherent" equitable powers to grant private gas companies the quick-take power,[4] these courts have almost universally acknowledged that Congress has not granted the extraordinary quick-take power to private gas companies. See, e.g., N. Border, 520 F. Supp. at 172. Neither the NGA nor any other provision of law grants private gas companies the quick-take power and the concomitant authority to seize possession of property before paying just compensation. As one court aptly summarized in interpreting the NGA:

> No statutory authority exists which would authorize a private party, such as [ETNG], to take immediate possession of the real property prior to the condemnation proceeding. Similarly, the authority to take immediate possession of the property cannot be implied in the mere grant to the plaintiff of the right to eminent domain because the language of Title 15 U.S.C. § 717f(h) is unequivocal. In addition, if an ambiguity were found in the statute the result would not change because statutes conferring the right of

[4] See, e.g., Sage 361 F.3d at 827-828; (App. at 27a-28a); but see Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000).

> eminent domain are strictly construed to exclude those rights not expressly granted.

Id.

The legislative grant of the ordinary power of eminent domain in the NGA does not include a grant of the extraordinary and additional quick-take power. See, e.g., N. Border v. 86.72 Acres, 144 F.3d at 471-72 (7th Cir. 1998). "Although [ETNG] possesses the authority pursuant to Title 15 U.S.C. § 717f(h) to exercise the right of eminent domain, this right is not in itself sufficient to authorize the taking of immediate possession prior to the condemnation proceeding itself." Id. Strict construction of statutes delegating the power of eminent domain dictates that powers not granted by Congress are excluded.

In drafting the NGA and other federal eminent domain statutes, Congress made a deliberate decision to withhold the quick-take power from private gas companies such as ETNG.[5] A comprehensive reading of federal eminent domain statutes confirms that Congress chose to withhold this extraordinary power from private gas companies.

When Congress has decided that particular condemnors should wield the quick-take power, it has expressly granted the power. See, e.g., 10 U.S.C. §§ 2538 (President, in war time), 2663 (Secretary of a military department, in war time); 16 U.S.C. §§ 425a (Secretary of Interior regarding specified

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[5] Congress likely withheld the quick-take power from private companies for two reasons. First, unlike the sovereign, private entities are not backed by the full faith and credit of the federal treasury so as to guarantee owners just compensation. If a private company becomes insolvent before final judgment and payment, a result now thinkable in the wake of the Enron debacle, the owners will suffer irreparable injury. Second, the motivation of a private entity is corporate profit and pecuniary gain while the motivation of government is presumably the good of the people or public interest.

Civil War battlefields), 430k (same); 33 U.S.C. § 594 (Secretary of Army for river and harbor improvements specifically authorized by Congress); 42 U.S.C. § 5196 (FEMA director, to respond to emergencies and disasters); 50 U.S.C. § 82 (President, to procure ships and material during war); 50 U.S.C. app. § 468 (President, in time of war or emergency).

Congress enacted a general quick-take statute, the Declaration of Taking Act ("DTA"), and it expressly reserved the quick-take power exclusively for actions "by and in the name of and under the authority of the United States." 40 U.S.C. § 3114; (App. at 90a). Congress reserved the quick-take power for the United States government alone. Not only does the DTA demonstrate Congress's intent to withhold the quick-take power from private parties, but it also demonstrates that district courts are not authorized to grant the quick-take power. If district courts were empowered to unilaterally authorize the use of quick-take power through injunctive relief, the DTA would have been unnecessary, as would each of the specific statutes noted above.

This Court has held that not even the President of the United States, in times of crisis and emergency, may seize immediate possession of property without legislative authorization to do so. Youngstown, 343 U.S. at 585-89. When the executive branch declared an emergency and seized the nation's steel mills without legislative authorization, the Court recognized that separation of powers restrains the use of eminent domain powers, which the Constitution places in the legislative branch alone. Id. at 582-589.

In Youngstown, the President possessed the ordinary power of eminent domain.[6] Id. at 585-86. Importantly, however, Congress had not authorized the President to seize immediate possession of property under the circumstances involved therein. Id. at 585-89. Because Congress had not authorized the President to seize immediate possession of the property, the Court did not permit the President to do so. Id. Likewise, ETNG lacks authority to exercise the quick-take power unless Congress specifically authorizes it to do so.

The district court violated the separation of powers when it unilaterally granted legislative powers belonging to Congress and authorized ETNG to seize immediate possession of the subject properties.

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. . . . [N]either department may invade the province of the other.

Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). As Chief Justice Marshall articulated early in the Court's history, "it is emphatically the duty and province of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Implicit in the court's designated role of interpreting laws and declaring their meaning is the clear

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[6] In addition to the statutes this Court cited in footnote two in Youngstown, the President also could have exercised the ordinary power of eminent domain through 40 U.S.C. § 3113 (formerly 40 U.S.C. § 257), which authorizes "an officer of the federal government" to take property for "public uses" when the "officer believes it is necessary . . . to do so."

restriction that courts may not affirmatively grant or exercise governmental powers of legislation or execution.

This Court has warned that courts should "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [the courts] by the Constitution." Muskrat, 219 U.S. at 352-58. "[F]rom its earliest history [this Court] has consistently declined to exercise any powers other than those which are strictly judicial in their nature." Id. at 356. The Constitution divides government into three distinct and independent branches, and "it is the duty of each to abstain from, and to oppose, encroachments on [the others]." Id. at 352.

"[T]he Constitution . . . did not provide for government by injunction in which the courts . . . can make law without regard to the action of Congress. . . . [C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971) (per curiam). "The Constitution's division of power among three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." New York v. United States, 505 U.S. 144, 182 (1992). Here, the lower courts exercised legislative powers, clearly invading the province of Congress.

Unlike other cases in equity in which the court simply fashions a remedy, the district court in this case actually used equity to delegate a legislative power of eminent domain that is vested in Congress. This power was not the court's to delegate. The district court arbitrarily stripped the landowners of their precious property rights—rights upon which many of the landowners (farmers) rely for their livelihood. Ignoring the constitutional separation of powers, the Fourth Circuit upheld the district court's actions.

Where, as here, a district court's "inherent" equitable powers collide with constitutional restraints, the former should yield to the latter.[7]

> The total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. . . . [T]he hardship of the case and the failure of the mode of procedure established by law is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles.

Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 658 (1874). While Congress chose to grant ETNG the ordinary power of eminent domain, it has chosen not to grant ETNG the extraordinary quick-take power. It is for Congress, not the courts, to grant the extraordinary quick-take power if it desires ETNG to wield such power.

In this case, the courts forced the constitutional separation of powers to yield to the district court's "inherent" equitable powers. Such judicial fiat "has no logical stopping point." Johnson v. Collins Entm't Co., 204 F.3d 573, 575 (4th Cir. 2000) (en banc).

> Inherent power wielded by life-tenured judges without authorization in statute . . . goes too far. Equity jurisdiction does not vest federal courts with a general power to grant relief whenever the legal remedies are not practical and efficient because it would literally place the whole rights and property of the community under the arbitrary will of the judge.

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[7] Additionally, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-765 (1980).

Id. (citing Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999) (emphasis added)). A district court's use of equitable powers to affirmatively grant legislative powers and expand the power of government over the people, as occurred here, truly is the "most formidable instrument of arbitrary power that could well be devised." Grupo Mexicano, 527 U.S. at 332.

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). "Courts . . . were set up by our founders to protect the liberties they valued." Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946). While much disagreement about the role and activism of the courts exists, courts clearly pose the most danger to the people when they unilaterally expand the scope and power of government over the people.

The district court, with the Fourth Circuit's subsequent approval, judicially created and granted to a private gas company extraordinary powers that Congress chose to withhold from private gas companies. The district court's actions represent judicial activism of the most dangerous type, as the judge unilaterally authorized a private party to wield extraordinary powers against the people. The district court's actions and the Fourth Circuit's opinion upholding the same violate the constitutional separation of powers, and the implications of the decision pose a serious threat to the rights and liberties of the people.

C. The Fourth Circuit's Opinion that District Courts May Use Rule 65 of the Federal Rules of Civil Procedure to Grant Powers Belonging to Congress Contravenes the Separation of Powers and Repudiates Any Limit on District Courts' "Inherent" Equitable Powers

The district court defended its decision with the assertion that because Congress did not grant private gas companies the quick-take power, district courts were somehow authorized to grant them that which Congress had not. The district court stated, "Congress did not give a private condemnor the right to immediate possession so that this issue would be left to the courts to consider on a case-by-case basis." (App. at 39a). This unsupported assertion, which the Fourth Circuit embraced, opens the floodgates of the most destructive form of judicial activism; it presumes that Congressional silence constitutes the delegation of authority to the courts to delegate legislative powers to private parties. The district court implied this grant of authority even though there is no legislative history or any other authority which suggests that Congress intended to delegate to district courts the authority to delegate the quick-take power.

The Fourth Circuit's rationale is equally disturbing, as it rejects any notion of limitations on the "inherent" equitable powers of federal courts. The Fourth Circuit has expanded the judiciary's "inherent" equitable powers in derogation of Congress's legislative decision whether to grant private gas companies the most extreme form of the already "awesome" power of eminent domain—the quick-take power. The Fourth Circuit concluded that district courts are authorized to use Rule 65 to grant the quick-take power in the form of injunctive relief. Sage, 361 F.3d at 824; (App. at 23a). This conclusion is flawed because it ignores the structural protections, such as the separation of powers, contained in the Constitution. The Constitution and the doctrine of

separation of powers do prohibit district courts from using Rule 65 to grant powers belonging to the legislature.

1. Contrary to the Fourth Circuit's Opinion, Rule 65 of the Federal Rules of Civil Procedure Does Not Give District Courts Authority to Grant Powers Belonging to Congress

The Fourth Circuit's opinion begins with the false premise that district courts are authorized to grant relief under Rule 65 in all situations where Congress or the Constitution has not expressly precluded the courts from taking such action. Sage, 361 F.3d at 824, 828; (App. at 23a, 29a-30a). This analysis ignores the structural protections of separation of powers and federalism and turns Article III, § 2, clause 1 of the Constitution on its head. Under that constitutional provision, district courts have only the powers the Constitution or Congress authorizes. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Courts are certainly not authorized to act in contravention of the Constitution.

The Fourth Circuit treats Rule 65 as a blank check for exercising unrestrained equitable power. The Fourth Circuit held that district courts may use Rule 65 to grant private parties the quick-take power "[b]ecause Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation." Sage, 361 F.3d at 824; (App. at 23a).

Instead of inquiring whether the district court had authority to grant the requested relief, the Fourth Circuit held that the district court had authority to grant ETNG the quick-take power because Congress had not expressly prohibited it. Id. The Fourth Circuit established the precedent that district courts are empowered to grant

equitable relief in any situation where Congress fails to specifically restrict the court's "inherent" equitable powers under Rule 65.

However, federal courts cannot act in violation of the constitutional separation of powers, regardless of whether such action is in the form of injunctive relief under Rule 65 or otherwise. The doctrine of separation of powers prohibits courts from taking any actions that invade the province of the other branches of government. The form of the court's actions does not somehow brand the court's impermissible actions with constitutional legitimacy. To permit district courts to exercise legislative powers in any form, including injunctive relief under Rule 65, is to permit the courts to impermissibly usurp legislative powers.

The Fourth Circuit cites Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 299 (1960) for the proposition that "[e]quitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Sage, 361 F.3d at 824; (App. at 23a). However, Mitchell cannot be read as authorizing district courts to take actions that exceed constitutional restraints.[8] No judicial opinion, act of Congress, or rule of procedure can authorize acts that are repugnant to the Constitution.

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[8] Mitchell is also easily distinguishable. In Mitchell, Congress expressly authorized equitable relief. Mitchell 361 U.S. at 291-92. Here, Congress has not expressly authorized equitable relief. In Mitchell, Congress specifically entrusted courts of equity with enforcement of the regulatory enactments at issue, and the Court merely fashioned a remedy for a violation of those enactments. Id. at 291-92. Here, the district court went beyond fashioning a remedy; it created new rights and granted powers belonging to the legislature. In Mitchell, the court carried out the policy of the legislature. Here, the district court unilaterally altered the policy of the legislature. Finally, in Mitchell, the non-moving party had violated the rights of the party seeking relief. Here, the landowners did not violate any rights of ETNG. Instead, the landowners sought to maintain possession of their property.

Mitchell does not authorize district courts to issue injunctive relief that invades the province of the legislature. Courts cannot use equity to subvert the law or to escape constitutional restraints placed upon the powers of the federal courts. Specifically in this field, it has been repeatedly held that the grant of eminent domain power is strictly construed against the condemning agency to restrict its powers. See supra § IB.

Citing Rule 65 is an unpersuasive attempt to justify the district court's unconstitutional actions. Judicial actions pursuant to Rule 65 are not immune from constitutional restraints. The Fourth Circuit may believe that the district court's decision to grant the quick-take power was more expedient than Congress's decision to withhold the power, but that does not give courts license to ignore the Constitution.

> [The Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with common sense and the public weal. Our Constitution vests such responsibilities in the political branches.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978).

If Congress's decision to withhold the quick-take power from private gas companies is a bad policy decision, it is up to Congress—not the courts—to amend the NGA.

2. Contrary to the Fourth Circuit's Opinion, Congress's "Tacit Approval" of the Federal Rules of Civil Procedure Did Not Empower Courts to Delegate Legislative Powers Belonging to Congress

Both the district court and the Fourth Circuit were unable to identify any legislative delegation of the quick-take power to private gas companies. The reason is simple: there is none. Nevertheless, the Fourth Circuit held that Rule 65 empowers courts to delegate legislative powers such as the quick-take power. The Fourth Circuit asserted that because "[n]either the Constitution, nor Congress, nor Rule 71A bars this sort of relief [i.e., an injunction granting ETNG the quick-take power] in a condemnation case," courts may delegate the quick-take authority through injunctive relief. Sage, 361 F.3d at 828; (App. at 29a-30a).

The Fourth Circuit relied on Congress's "tacit approval" of the Federal Rules of Civil Procedure for alleged authorization to use Rule 65 to delegate the legislative quick-take power. Sage, 361 F.3d at 824; (App. at 23a). Congress surely did not intend to grant courts the authority to delegate legislative powers when it "tacitly" approved the Federal Rules of Civil Procedure. After all, the very enabling act declares that the rules shall not enlarge any substantive rights. 28 U.S.C. § 2072; (App. at 87a).

The Fourth Circuit's reasoning has no logical stopping point to excessive and arbitrary judicial power wielded under the guise of Rule 65, as it assumes that courts are entitled to delegate any legislative powers that Congress has not specifically precluded courts from delegating. Instead of determining whether Congress actually granted a particular right or power, courts may now unilaterally create and grant a right or power, as long as Congress did not expressly prohibit the court from granting the particular

right or power. Sage, 361 F.3d at 824, 828; (App. at 23a, 30a). This reasoning destroys any notion of separation of powers.

The Fourth Circuit's overly expansive reading of the Federal Rules of Civil Procedure empowers courts to substitute their will, in delegating legislative powers, for that of Congress. The Fourth Circuit's decision will have far-reaching consequences that will bedevil the judicial system—not to mention the body politic—for years to come. The better course would be to stifle the concept now, before it hardens into precedent and emboldens other activists to act in a multitude of factual scenarios.

3. Contrary to the Fourth Circuit's Opinion, Private Condemnors May Exercise the Quick-Take Power and Thereby Seize Possession of Property Before Paying Compensation Only When Congress Grants This Power to the Condemnor

The Fourth Circuit stated that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." Sage, 361 F.3d at 824 (citing Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890)); (App. at 22a). While this is a true statement of the law, it is not a complete statement of the law. A condemnor may seize immediate possession of property before providing the owner just compensation but only when the legislature has granted it the power and authority to do so.

Significantly, in Cherokee and its progeny, Congress or the appropriate legislative body expressly granted the quick-take power to the party seeking to take immediate possession of property prior to paying compensation. See, e.g., Sweet v. Rechel, 159 U.S. 380 (1895) (the legislature authorized the city to seize immediate possession); Kennedy v. Indianapolis, 103 U.S. 599, 599-600 (1880) (the legislature

"authorized . . . the [condemnor] to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the work"); Cherokee, 135 U.S. at 659 (the legislature authorized the condemnor to take possession of the property pending appeal from the award of just compensation as determined by referees at trial).

As this Court acknowledged in Sweet, "it is competent for the legislature, in the exercise of . . . its power to appropriate private property for public uses, to authorize the city to take the fee in the lands . . . prior to making compensation." 159 U.S. at 407 (emphasis added). Cherokee does not stand for the proposition that district courts may grant the quick-take power in the absence of legislative authorization. Rather, Cherokee and its progeny demonstrate that the legislature, not the courts, may grant the quick-take power when the legislature deems it necessary.[9]

II. The Fourth Circuit's Opinion Directly Conflicts With the Seventh Circuit's Opinion in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998)

The Fourth Circuit's opinion directly conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998). The Federal Energy

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[9] ETNG may claim that the Eighth Circuit delegated the quick-take power to the United States in Commercial Station Post Office v. United States, 48 F.2d 183 (8th Cir. 1931). However, a close reading of the facts of that case reveals that the court granted the condemnor possession of the property pending appeal, which was after trial and payment of compensation.

Any reliance on Atlantic Seaboard Corporation v. Van Sterkenburg is likewise misplaced because the court in that case merely authorized the condemnor to take possession of the property only after trial and after payment of just compensation as determined at trial. 318 F.2d 455, 459-60 (4th Cir. 1963).

Regulatory Commission ("FERC") granted Northern Border Pipeline Company ("Northern Border") a "federal certificate of necessity," thus giving it the right to take property through the ordinary power of eminent domain granted in the NGA. Id. at 470. "Not content with the pace of an ordinary eminent domain proceeding, Northern Border moved for immediate possession." Id.

Because Congress has not granted private gas companies the quick-take power, Northern Border, like ETNG, asked the district court to invoke its "inherent" equitable powers and grant Northern Border the quick-take power through mandatory injunctive relief. Id. The district court refused to grant Northern Border the quick-take power, holding that Northern Border "has no legal right to immediate possession [of the owners' property]." Id. at 471.

The Seventh Circuit upheld the district court's opinion, declaring that Northern Border's request for equitable relief "misapprehends the relief available in preliminary injunctive proceedings." Id. The Seventh Circuit explained that Northern Border mistakenly believed that its "lack of quick-take authority should not defeat [its] request for a preliminary injunction." Id. at 472. However, "[a] preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought." Id. at 471 (emphasis added). Northern Border had no right or entitlement to seize possession of the landowners' property until after trial and payment of compensation because it lacked the quick-take power. Id.

The Seventh Circuit aptly recognized the difference between the ordinary power of eminent domain and the extraordinary quick-take power. Because Congress has granted private gas companies only the ordinary power of eminent domain, these companies have no right or entitlement to exercise the quick-take power. Id. at 471-72.

Private gas companies have no power or authority to seize possession of a landowner's property *before paying the* landowner just compensation. Id.

The Seventh Circuit explained that a gas company's "rights to the [owners'] land do not vest when the FERC issues it a certificate [of necessity]." Id. at 471. The court then held that "[b]ecause [Northern Border] disavow[ed] any claim that it has a substantive entitlement to the defendants' land right now, rather than an entitlement that will arise at the conclusion of the ordinary eminent domain process, Northern Border is not eligible for the relief it seeks." Id.

Similarly, ETNG has no right or entitlement to seize possession of the landowners' property until after it has provided just compensation. Like Northern Border, ETNG can point to no legislative grant that gives it the power or authority to seize possession of the landowners' property before providing the landowners just compensation. ETNG possesses only the ordinary power of eminent domain; it does not possess the additional quick-take power. Thus, it has a right or entitlement to take possession of the landowners' property only after payment of compensation at the conclusion of the ordinary eminent domain process.

The Fourth Circuit futilely attempts to distinguish the Seventh Circuit's decision in Northern Border. The court argues that Northern Border is not analogous because the gas company in that case did not have an "order determining that it had the right to condemn." Sage, 361 F.3d at 827; (App. at 29a). However, the Seventh Circuit's opinion did not turn on any such purported order, nor do the facts of that case indicate any lack of such order. See generally N. Border, 144 F.3d at 469. In fact, the Seventh Circuit never discussed or even mentioned an order confirming the right to take. See id.

The Fourth Circuit not only misapprehends the Northern Border decision, but it also misapprehends the effect of an order of condemnation. An order of condemnation merely establishes that a condemnor possesses the power of eminent domain and that the condemnor is authorized to take property in accordance with the powers it possesses. Such an order does not authorize district courts to bestow any additional powers, such as the quick-take power, on condemnors. It merely allows ordinary condemnation to proceed.

The Seventh Circuit cogently explained its rationale, and its decision speaks for itself. The Seventh Circuit explained that the "district court had no authority to enter a preliminary injunction awarding immediate possession" because Northern Border did not have a right to seize possession of the landowners' property until after the "conclusion of the ordinary eminent domain process." Id. at 471 (emphasis added). The Seventh Circuit correctly concluded that Congress's grant of the ordinary power of eminent domain does not authorize courts in equity to grant the additional quick-take power. Northern Border lacked the quick-take power and thus had no right to seize possession of the landowners' property before trial and before payment of compensation determined at trial.

The Seventh Circuit applied fundamental precepts of equity that comport with separation of powers. Courts of equity fashion remedies for existing rights, but they cannot create new rights. Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122 (1874). Courts of equity "can intervene only where legal rights are invaded or the law violated." Chapman v. Sheridan-Wyo. Coal Co., 338 U.S. 621, 631 (1950). In Northern Border, just as in this case, the gas company lacked a right or entitlement to seize immediate possession of the landowners' property.

Even the Fourth Circuit was constrained to admit that ETNG's authority to take possession of the landowners' property does not arise until after payment of just compensation. The Fourth Circuit stated that "[o]nce the right to condemn is established by court order, it follows that the company will be entitled to possession when title is transferred at the end of the case." Sage, 361 F.3d at 825 (emphasis added); (App. at 24a). The "right to condemn," i.e., the ordinary power of eminent domain, authorizes a condemnor to proceed with acquisition but not to seize possession of property until after payment of just compensation.

Contrary to the Seventh Circuit's decision in Northern Border, the Fourth Circuit's decision establishes that when Congress grants a private gas company the ordinary power of eminent domain, courts of equity are authorized to unilaterally grant the additional quick-take power. Congress, through its deliberative process, chose not to subject the rights of individual property owners to private gas companies that would wield the extraordinary quick-take power.[10] The Fourth Circuit chose otherwise and approved the district court's decision to substitute its will for that of Congress.

The Seventh Circuit correctly applied principles of separation of powers, equity, and eminent domain jurisprudence. The Fourth Circuit created new standards that are contrary to these longstanding, foundational principles. Consequently, a split in the circuits now exists, and only this Court can resolve it.

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[10] For farmers struggling to make a living, the promise of payment after trial, which may be three or more years from the date ETNG seized their property, is of small solace. At least if the farmers were paid before ETNG destroyed the use of portions of their property, they could immediately purchase other productive land to continue their farm or business. Additionally, the lost income suffered by these farmers is unrecoverable. Joslin Mfg. Co. v. Providence, 262 U.S. 668, 675 (1923).

III. The Fourth Circuit's Sweeping Opinion Will Encourage Parties to Seek Equitable Relief to Obtain Rights and Powers They Did Not Possess at Law and to Which They Had No Substantive Right or Entitlement

The Fourth Circuit's overly broad interpretation of the district court's equitable powers and its seemingly limitless view of the courts' ability to issue injunctive relief under Rule 65 invites parties to seek injunctive relief to obtain new substantive rights or powers which the parties lack at law. Until now, a party seeking injunctive relief had to first show they had a substantive right or entitlement to the relief sought. N. Border, 144 F.3d at 471. The Fourth Circuit has done an end-run around that sensible rule and established a new rule.

Under the Fourth Circuit's rule, courts may now grant legislative powers or rights to private corporations even in the face of Congress's decision to withhold these powers or rights. The Fourth Circuit has freed courts in equity to venture far beyond fashioning a remedy for an existing right; courts may now bestow new rights and powers on private parties. More importantly, courts are now free to delegate legislative powers belonging to Congress.

The implication of this decision is that the constitutional separation of powers does not limit courts. District courts are authorized to go beyond the unambiguous language of a statute to reach a result the court desires in a particular case. Parties will rely on this decision and call upon courts to exercise similar judicial activism and unfettered use of equitable powers in other contexts. The extraordinary power given a private gas company will have to be equally extended to any party seeking the extraordinary injunctive power of a federal court in other cases, whether a private individual or corporation.

Under the guise of Rule 65, unelected, life-tenured judges may now dispense powers that are committed to Congress and may thereby affirmatively expand the scope and reach of government over the rights and liberties of the people. This claim of judicial omnipotence violates the separation of powers, subverts the powers of the legislative branch, and threatens the rights of the people. It places legislative powers and the rights, liberties, and property of the people at the will of individual judges wielding unrestrained "inherent" powers.

Such judicial overreaching is impermissible under our constitutional structure of government. As many of the framers feared, district courts' unfettered equitable powers may, in due time, swallow the powers of the other branches of government and pose a most significant threat to the rights and property of the people.

CONCLUSION

This Court has warned that "[i]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." Monongahela, 148 U.S. at 325. The Fourth Circuit's decision frees courts of equity from almost any restraints, including constitutional restraints. Courts may now exercise their "inherent" equitable powers in contravention of the constitutional doctrine of separation of powers. The Fourth Circuit has authorized district courts to use their "inherent" equitable powers to grant legislative powers of eminent domain that belong to Congress. Moreover, courts may take such extreme action even after interpreting the law and determining that Congress withheld the very powers the court subsequently grants.

The longstanding doctrine of separation of powers will soon yield to the unfettered equitable powers of the courts.

Under the new standards espoused by the Fourth Circuit, the rights and property of the people are no longer protected by law but are subject to the variety and uncertainty of each judge's conscience.

This is no mere hypothetical invasion embellished by hyperbole. The blunt fact is that the district court not only delegated legislative power but enforced its will by sending armed federal marshals to patrol the property under the instruction and supervision of ETNG. Accordingly, the petitioners respectfully request a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the gross abuse of power in the decision below.

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United States Court of Appeals,
Fourth Circuit.

EAST TENNESSEE NATURAL GAS COMPANY, Plaintiff-Appellee,
v.
John F. SAGE; Linda K. Sage, Defendants-Appellants,
and
1.20 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Margaret Clanton, Defendant-Appellant,
and
.28 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Scott A. Fontaine; Lillie M. Fontaine, Defendants-Appellants,
and
2.09 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff Appellee,
v.
Alva Holland, Defendant-Appellant,
.54 Acres in Henry County, Virginia; Janet M. Holland; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

3 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Maynard R. Joyce, Defendant-Appellant,
and
2.26 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ervin L. Frazier, Jr., Defendant-Appellant,
and
1.02 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Barbara G. Vass; Dossie G.V. Hall, a/k/a Dossie Shockley Vass, Defendants-Appellants,
and
1.59 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe; Unknown Owners, Defendants.
5 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Layton Russell Hancock; John Wendell Hancock; Sonia Lucille Easter; Una Faye Saunders; Wayne Dwight Hancock; Heirs of Royal Early Hancock, Defendants-Appellants,
and
2.57 Acres in Carroll County, Virginia; John Doe, et al.; Unknown Owners;

Josephine H. Powers; Rudolph Hancock; Alene Sumner; James F. Hancock;
Talford Clay Hancock; Thomas Kenneth Hancock;
Averette Early Hancock; Jane
A. Harrison, County Assessor, Defendants.
6 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
H. Wade Baker; Lola W. Baker,
Defendants-Appellants,
and
1.91 Acres in Carroll County, Virginia; John Doe, et al.; Unknown Owners;
Jane A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Gregory L. Seibert, Defendant-Appellant,
and
.45 Acres in Carroll County, Virginia; Jane A. Harrison; John Doe, et al.;
Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff Appellee,
v.
Robin Marie Seibert; Gregory L. Seibert,
Defendants-Appellants,
and
.61 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
8 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Helen E. Melton; Charlotte A. Edwards,
Defendants-Appellants,
and

Jane A. Harrison, County Assessor; John Doe, et al.; Unknown Owners; 4.76 Acres in Carroll County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ralph D. Howell; Mabel Fulcher,
Defendants-Appellants,
and
Rose C. Howell; John Doe, et al.; C. Jerry Love, Commissioner of Revenue; Unknown Owners; 3.18 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Melvin A. Thomas, Defendant-Appellant,
and
1.40 Acres in Patrick County, Virginia; John Doe, et al.; C. Jerry Love, Commissioner of Revenue; Unknown Owners, Defendants.
10 East Tennessee Natural Gas Company,
Plaintiff Appellee,
v.
John M. Lewis; Cornelia A. Lewis,
Defendants-Appellants,
and
C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners; .
37 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Earl R. Potter; Joan A. Potter,
Defendants-Appellants,
and

C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners; .
60 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Jerry S. Thomas; Betty B. Thomas,
Defendants-Appellants,
and
3.04 Acres in Patrick County, Virginia; John Doe, et al.; Unknown Owners; C.
Jerry Love, Commissioner of Revenue, Defendants.
12 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Nancy U. Stanley, Defendant-Appellant,
and
3.62 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
13 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Otra Martin; Edna Lou Martin Smart; Ellen M. Fulcher; Harvey Glenn Fulcher,
Defendants-Appellants,
and
3.81 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
14 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robert E. Meadows; Marion C. Meadows,
Defendants-Appellants,

and

.94 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

15 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

William Troy Strickland; Susan M. Strickland, Defendants-Appellants,

and

1.13 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

16 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

James A. Keesee; Joanne Richmond Keesee, Defendants-Appellants,

and

1.58 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

17 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

Thomas C. Williams, Jr.; Jeannie B. Williams, Defendants-Appellants,

and

3.27 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

18 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

Anissa J. Brady, a/k/a Anissa Holland,
Defendant-Appellant,
and
.65 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Charles K. Webb; Lena Webb,
Defendants-Appellants,
and
.64 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Calvin Hugh Webb; Linvol Oscar Webb; Wendell
Wayne Webb, Defendants-
Appellants,
and
3.38 Acres in Carroll County, Virginia; John Doe,
et al.; Jane A. Harrison,
County Assessor; Unknown Owners, Defendants.
20 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Alva Jackson Horton; Heath Webb,
Defendants-Appellants,
and
1.60 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
21 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

George Lewis Webb; Edward Paul Webb; Roger Lee Webb; Joel Ray Webb,
Defendants-Appellants,
and
.30 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
22 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Dorothea W. Bryant, Defendant-Appellant,
and
1.23 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Clyde Holland; Shirley Holland,
Defendants-Appellants,
and
5.2 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
L.J. Rector; Charis Jean Rector; Johnny J. Rector; Joe Rector, Defendants-
Appellants,
and
3.98 Acres in Smyth County, Virginia; Richard Walker, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
24 East Tennessee Natural Gas Company,
Plaintiff-Appellee,

v.

Fred Tolley; Guida Tolley, Defendants-Appellants,

and

4.0 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

James Fogelsong; Glen Stuart Fogelsong,

Defendants-Appellants,

and

2.64 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

Weaver Enterprises, Incorporated,

Defendant-Appellant,

and

11.42 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

26 East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

Ronnie Lynn Goforth; Susan D. Goforth;

and

3.5 Acres/Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John

Doe, et al.; Unknown Owners, Defendants.

No. 03-1708 No. 03-1709 No. 03-1710
No. 03-1711 No. 03-1712 No. 03-1713
No. 03-1714 No. 03-1715 No. 03-1716
No. 03-1717 No. 03-1718 No. 03-1719
No. 03-1720 No. 03-1721 No. 03-1722
No. 03-1723 No. 03-1724 No. 03-1725
No. 03-1726 No. 03-1727 No. 03-1728
No. 03-1729 No. 03-1730 No. 03-1731
No. 03-1732 No. 03-1733 No. 03-1734
No. 03-1735 No. 03-1736 No. 03-1737
No. 03-1738 No. 03-1739 No. 03-1740
No. 03-1741 No. 03-1797.

Argued: Sept. 25, 2003.
Decided March 22, 2004.
[ENTERED: March 22, 2004]

ARGUED: Joseph Thomas Waldo, Waldo & Lyle, P.C., Norfolk, Virginia; William B. Hopkins, Jr., Martin, Hopkins & Lemon, P.C., Roanoke, Virginia; Gary Michael Bowman, Roanoke, Virginia, for Appellants. Lela Merrell Hollabaugh, Waller, Lansden, Dortch & Davis, Nashville, Tennessee, for Appellee. **ON BRIEF:** Joseph L. Lyle, Jr., Jeremy P. Hopkins, Waldo & Lyle, P.C., Norfolk, Virginia; Allen Wayne Dudley, Jr., Furrow & Dudley, P.C., Rocky Mount, Virginia, for Appellants. Michael S. Mizell, Waller, Lansden, Dortch & Davis, Nashville, Tennessee, for Appellee.

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge MICHAEL wrote the opinion, in which Judge NIEMEYER and Judge DIANA GRIBBON MOTZ joined.

OPINION

MICHAEL, Circuit Judge:

The Natural Gas Act (NGA or the Act), 15 U.S.C. § 717f(h), gives a gas company the power to acquire property by eminent domain, but the Act does not provide for immediate possession, that is, possession before just compensation is determined and paid in a condemnation action. The main question in this appeal is whether a gas company can obtain immediate possession through the equitable remedy of a preliminary injunction. We hold that it can. We also hold that the district court properly granted preliminary injunctive relief to the gas company in the several cases consolidated in this appeal; we therefore affirm the injunction orders.

I.

East Tennessee Natural Gas Company (ETNG) is a regional gas transportation company. Several years ago the company developed plans for what it calls the Patriot Project, a project to construct an interstate gas pipeline, twenty-four inches in diameter and about ninety-four miles long, through portions of Tennessee, Virginia, and North Carolina. Before a gas company like ETNG can build and operate a new pipeline, it must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC or the Commission). The procedure for obtaining a certificate from FERC is set forth in the NGA, I5 U.S.C. § 717 *et seq.*, and its implementing regulations, 18 C.F.R. § 157.1 *et seq.* The process begins with an application from the gas company that includes, among other information, (1) a description of the proposed pipeline project, (2) a statement of the facts showing why the project is required, and (3) the estimated beginning and completion date for the project. 15 U.S.C. § 717f(d) ; 18 C.F.R. § 157.6(b).

Notice of the application is filed in the Federal Register, 15 U.S.C. § 157.9, public comment and protest is allowed, id § 157.10, and FERC conducts a public hearing on the application, *id* § 157.11. As part of its evaluation, FERC must also investigate the environmental consequences of the proposed project and issue an environmental impact statement. *See* 42 U.S.C. § 4332. At the end of the process FERC issues a certificate if it finds that the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In its order issuing a certificate, FERC specifies a date for the completion of construction and the start of service. 18 C.F.R. § 157.20(b). The certificate may include any terms and conditions that FERC deems "required by the public convenience and necessity." *Id.* § 157.20. Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise "the right of eminent domain" over any lands needed for the project. 15 U.S.C. § 717f(h).

On July 26, 2001, ETNG filed its application for a certificate of public convenience and necessity for the Patriot Project. *See Preliminary Determination of Non-Environmental Issues* I, 98 FERC ¶ 61331, 2002 WL 471183 (2002). Notice of the application was published in the Federal Register on August 9, 2001. *Id.* at 4. Thereafter, approximately 200 interested parties submitted comments or protests, id. at 4, appendix, and FERC held several public hearings on the application. FERC released its preliminary determination on March 27, 2002. In this document, which did not cover environmental issues, the Commission found that the Patriot Project would help satisfy the growing energy needs in portions of the three-state area of Tennessee, Virginia, and North Carolina. Specifically, the project would supply gas to new electric generation plants, meet the needs of local utilities for additional gas, and bring gas service to portions of southwestern Virginia for the first time. *Id.* at 15. The preliminary determination also noted that "there may be

some adverse impacts on landowners from the construction of the project." *Id.* After weighing these and other factors, FERC concluded that, subject to consideration of environmental issues, the public benefits of the Patriot Project would out-weigh any adverse impacts. *Id.* at 1. The Commission then moved to the environmental review process. Again, the public and interested parties were invited to submit comments and to participate in public meetings. *Order Denying Rehearing, Authorizing Abandonment, and Issuing Certificate* 13-14, 101 FERC ¶ 61188, 2002 WL 31973796 (2002). On September 22, 2003, the Commission issued its final environmental impact statement (FEIS). *Id* at 14. The FEIS recommended a number of mitigation measures that ETNG should take to avoid or minimize environmental damage. *Id* at 14- 19. In the end, the FEIS concluded that construction and operation of the Patriot Project would result in limited adverse environmental impacts. *Id.* at 30.

FERC's sixteen-month review of ETNG's application ended on November 20, 2002, when the Commission by formal order issued ETNG a certificate of public convenience and necessity. *Id* at 1. The FERC order confirms that "[i]ssuance of the certificate ... permits [ETNG] to acquire land for the pipeline by eminent domain, if it cannot reach agreement with the owner of land authorized." *Id.* at 20. The order requires ETNG to complete construction and make the pipeline available for service by January 1, 2005. *Id.* at 31. As the FEIS recommended, the certificate incorporates sixty-nine conditions that ETNG has to meet during construction. *Id* at 31-44. Among other things, the conditions require ETNG to: (I) file weekly status reports with FERC during construction, (2) follow the mitigation measures described in the environmental impact statement, (3) employ environmental inspectors to monitor compliance with the mitigation measures, (4) monitor vegetation for at least two

growing seasons following the completion of the project, and (5) limit construction to daylight hours.

As soon as FERC issued the certificate to ETNG, the company pursued negotiations with the affected landowners to acquire the easements to construct, operate, and maintain the new pipeline. The line will cross over 1,300 tracts of land in Tennessee, Virginia, and North Carolina. Through negotiations with landowners and a limited amount of condemnation litigation in North Carolina and Tennessee, the company was able to acquire over ninety percent of the right-of-way. That left about 130 tracts in Virginia where easements were still needed. In December 2002 ETNG filed 133 actions in the Western District of Virginia seeking orders of condemnation for the easements over the *820 remaining tracts. Within a couple of months of filing the condemnation actions, ETNG was able to settle with the owners of almost fifty of these tracts, leaving eighty-five or so that were still the subject of litigation.

At the same time ETNG filed the condemnation actions, it filed motions for immediate possession of the easements to prevent delays in construction. The NGA's eminent domain provision is silent on the question of immediate possession, so ETNG contended that the district court could use its "inherent equitable power" to grant this relief. J.A. 22 (joint appendix references are to case no. 03-1708(L)). The landowners filed answers challenging the breadth of ETNG's right to condemn, and they opposed the motions for immediate possession. The district court decided to deal with the litigation in stages, dealing first with the questions about ETNG's right to take. Thereafter, if required, the court would consider the motions for immediate possession, leaving the issue of just compensation in each case for last.

On May 8, 2003, the district court issued several identical opinions holding that ETNG could exercise the right of

eminent domain to acquire the necessary easements through the tracts in litigation. In supplemental opinions filed June 6, 2003, the court explained its decision to grant ETNG's motions for immediate possession. The court acknowledged that there is no provision for immediate possession in the NGA. Nevertheless, the court held that it could "use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction." J.A. 76. The court found that ETNG had established its right to immediate possession by satisfying the standards required for a preliminary injunction under *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig*, 550 F.2d 189 (4th Cir.1977). Among other things, the court found that holding up "the project's completion until the compensation for the last parcel is determined" would result in an extended delay. J.A. 78. This delay, the court said, would cause significant financial harm to ETNG and its potential customers. On the other hand, the court found that harm to the landowners would be slight, especially because they had the "right to draw down the money ETNG has deposited with the Court based on [the company's] appraisal." J.A. 78-79. Finally, the court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79.

The landowners, in several cases that we have consolidated, appeal the district court's preliminary injunction orders granting immediate possession. The landowners' main argument is that ETNG cannot take possession prior to the determination of just compensation. (The landowners now concede that ETNG has a legal right to take the property.) They further argue that even if the district court had the power to award immediate possession by preliminary injunction, the court erred in granting injunctions in these cases. Finally, some of the landowners claim that the district court lacked jurisdiction over their cases because the complaints did not sufficiently identify the property to be taken.

II.

A.

The first question is whether the district court can use its equitable power to order immediate possession in a condemnation case. We begin our discussion by reviewing the mechanics of how the federal power of eminent domain is usually exercised. Congressional authorization is required for land to be condemned by the government for public use. *See United States v. N. Am. Transp. Co.*, 253 U.S. 330, 333-34, 40 S.Ct. 518, 64 L.Ed. 935 (1920); IA J. Sackman, Nichols on Eminent Domain § 3.03[1] (rev.3d ed.). Congress sometimes exercises the power of eminent domain directly by enacting a statute that appropriates specific property. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984). Congress's normal practice, however, is to delegate the power of eminent domain to government officers who may condemn property in the name of the United States for public use. And Congress may, as it did in the NGA, grant condemnation power to "private corporations ... execut[ing] works in which the public is interested." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L.Ed. 206 (1878). Although the federal statutes conferring the power of eminent domain routinely identify the officer who may exercise the power and the purpose for which it may be exercised, the statutes typically do not prescribe the procedural methods or steps for exercising the power. *See, e.g.*, 10 U.S.C. § 2663(a) ("Secretary of a military department may ... acquire by condemnation any interest in land ... needed for the site, construction, or operation of fortifications, coast defenses, or military training camps"); 16 U.S.C. § 404c-11 ("The Secretary of the Interior is authorized in his discretion to acquire for inclusion within the Mammoth Cave National Park by ... condemnation ... any lands ... within the maximum boundaries as authorized by ... this title."); *see also Kirby*, 467

U.S. 1, 3 n. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984). When a condemnation action becomes necessary, a government official has two statutory methods available for exercising the power of eminent domain. Under the first method, called "straight condemnation," the action usually proceeds to a determination of just compensation and final judgment before the condemnor takes possession. *See* 40 U.S.C. § 3113 (formerly codified at 40 U.S.C. § 257); *Kirby*, 467 U.S. at 3-4, 104 S.Ct. 2187. Under the second method, often referred to as "quick-take," the government may take possession of the condemned property at the beginning of the case. *See, e.g.*, 40 U.S.C. § 3114 (formerly codified at 40 U.S.C. § 258a).

In straight condemnation the government official requests the Attorney General to initiate the condemnation action in district court. 40 U.S.C. § 3113. A special rule, Fed.R.Civ.P. 71A, governs the procedure in a condemnation action. *See Kirby*, 467 U.S. at 3-4, 104 S.Ct. 2187. Under Rule 71A the complaint must set forth the authority for the taking, the use for which the property is being taken, the identity of the property, and the interest to be acquired. Fed.R.Civ.P. 71A(c)(2). After the complaint is filed, the action proceeds in due course to the determination of just compensation for the owner of the land. *Id.* § 71A(h). Rule 71A does not contain procedures for dealing with issues of prejudgment possession by the condemning authority. Under traditional procedures, however, the condemning authority takes possession of the property after the determination and payment of just compensation. *See Kirby*, 467 U.S. at 4, 104 S.Ct. 2187; 6 Nichols, *supra*, § 24.10[1]. As the Supreme Court indicated in *Kirby*, when just compensation is determined first, "[t]he practical effect ... is to give the government an option to buy the property at the adjudicated price. If the government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." *Kirby*, 467 U.S. at 4, 104 S.Ct. 2187 (citation omitted). On the other hand, "[i]f the

government decides not to exercise its option, it can move for dismissal of the condemnation action." *Id. See also* Fed.R.Civ.P. 71(A)(i)(3).

The second method of taking, prescribed mainly in the Declaration of Taking Act (DTA), provides the government with a more expeditious procedure. 40 U.S.C. § 3114. The DTA's quick-take provisions authorize the government to take immediate possession of condemned property. [FN*] When the government proceeds under the DTA, it files a "declaration of taking" that, among other things, states the authority for the taking, states the public use for which the land is taken, and provides an estimate of just compensation. Once the government deposits the estimated amount with the court, "to the use of the persons entitled to the compensation," title to the condemned property automatically vests in the United States. *Id.* § 3114(a), (b); *Kirby*, 467 U.S. at 4-5, 104 S.Ct. 2187 . While the DTA gives the government the right of immediate possession, the time and terms of possession are fixed by the district court. 40 U.S.C. § 3114(d)(1). The precise compensation figure is determined later. ETNG did not try to use DTA's quick-take provisions, presumably because the statute only applies to condemnation proceedings "brought by and in the name of the United States." *Id.* § 3114(a).

> FN* The DTA gives any government official with condemnation authority the right to take immediate possession. A few statutes give this right to specific officials. *See, e.g.*, 42 U.S.C. § 5196(i)(1) (Director of the Federal Emergency Management Agency may "procure by condemnation or otherwise ... materials and facilities for emergency preparedness, with the right to take immediate possession thereof'); 33 U.S.C. § 594 (when Secretary of Army is authorized to

> take lands necessary for harbor improvements, he "shall have the right to take immediate possession"); *see also* 10 U.S.C. § 2663(b) ("In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation ... take and use the land to the extent of the interest sought to be acquired."). These scattered statutes appear to be superfluous to the extent they confer the right of immediate possession, unless they allow an even more expeditious process than the DTA. That is not an issue for today, however.

The Natural Gas Act, like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick-take or immediate possession. The Act simply says that any holder of a certificate of public convenience and necessity may acquire property "by the exercise of eminent domain in the district court" 15 U.S.C. § 717f(h). The Act further provides that "the practice and procedure in any action or proceeding for that purpose ... shall conform ... with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." *Id.* Courts, including the district court here, agree that this state procedure requirement has been superseded by Rule 71A. *See N. Border Pipeline Co. v. 64.111 Acres of Land,* 344 F.3d 693 (7th Cir.2003); *S. Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1374 (11th Cir.1999); *see also Kirby,* 467 U.S. at 4 n. 2, 104 S.Ct. 2187. As we have said, Rule 71A does not provide procedures for allowing early possession. The Advisory Committee that drafted Rule 71A was well aware of the statutes (the DTA was the main one) giving the government the right of immediate possession. The committee considered, but decided against, including procedures in Rule 71A for exercising this right. According

to the committee, "the procedure ... being followed [to allow immediate possession] seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion." Fed.R.Civ.P. 71A advisory committee's supplementary report, 11 F.R.D. 222, 228 (Mar.1951). Rule 71A thus contains no language that prohibits a condemnor from pursuing any available procedures to obtain possession prior to the entry of final judgment. These procedures could include an application for a preliminary injunction under Rule 65(a) because the regular rules of civil procedure apply when Rule 71A is silent. *See* Fed.R.Civ.P. 71A(a).

In any event, if the proceedings in the eighty-five separate cases here had taken their normal course under Rule 71A, ETNG would not have been able to enter each tract until just compensation was determined and paid on that tract. ETNG asserted that determining just compensation first would cause great delay in construction and in placing the pipeline in operation. In order to avoid this delay, ETNG filed its motions for immediate possession, contending that it met the standards for a preliminary injunction. The statute (the NGA) that gives it the power to condemn is silent on the issue of immediate possession, and the company did not seek to assert quick-take authority under the DTA. Thus, the specific question raised before the district court, and now presented on appeal, is whether a court may use its equitable powers to grant a preliminary injunction allowing immediate possession when there is no provision for that relief in the NGA or Rule 71A.

B.

A federal court has the power to grant equitable relief, *see Gordon v. Washington*, 295 U.S. 30, 36, 55 S.Ct. 584, 79 L.Ed. 1282 (1935), but this power is circumscribed by the venerable principle that "equity follows the law," *Hedges v.*

Dixon County, 150 U.S. 182, 192, 14 S.Ct. 71, 37 L.Ed. 1044 (1893). Equity, in other words, may not be used to create new substantive rights. *See, e.g., Norwest Bank of Worthington v. Ahlers*, 485 U.S. 197, 206-07, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). However, when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate. *See Berdie v. Kurtz*, 88 F.2d 158, 159 (9th Cir.1937); *Am. Brake Shoe & Foundry Co. v. N.P. Rys. Co.*, 293 F. 633, 637-38 (2d. Cir.1923). The district court followed these principles when it granted ETNG equitable relief in the form of a preliminary injunction that allowed the company to take early possession of the condemned property.

The district court discharged its duty to adjudicate these cases by first taking up the question of whether ETNG had a substantive right to condemn the landowners' property. After considering the briefs of the parties and hearing oral argument, the court issued orders determining that "ETNG has established its right to exercise eminent domain over the [landowners'] property as outlined in the [c]ertificate [of public convenience and necessity issued by FERC]." J.A. 74. These orders gave ETNG an interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied. *See Seymour v. Freer*, 8 Wall. 202, 75 U.S. 202, 213-14, 19 L.Ed. 306 (1868)(when a party has an interest in property "distinct from legal ownership," that interest "constitute[s] an equity which a court of equity will protect and enforce"). Therefore, once ETNG's right to take the easements was determined, it was proper for the district court to consider ETNG's motions for equitable relief in the various cases, specifically, its requests for preliminary injunctions granting immediate possession. As the discussion in part III, *infra*, establishes, the district court carefully considered the requirements for granting a preliminary injunction. A preliminary injunction is, of

course, "appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 220, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). *See also In re Microsoft Corp. Antitrust Litig.,* 333 F.3d 517, 525 (4th Cir.2003). The district court's holding that ETNG had established its right to condemn meant that it would have been entitled to possession upon the entry of final judgment. Because the court found that the requirements for a preliminary injunction had been met, the court granted immediate possession to ETNG as a form of intermediate relief. Again, the district court followed established principles and procedures in granting equitable relief. The landowners argue that general principles of equity are inapplicable here because equitable relief in the form of immediate possession is barred in a condemnation case. We disagree.

To begin with, the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid. As the Supreme Court said a long time ago, the Constitution "does not provide or require that compensation be paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. S. Kan. Ry. Co.,* 135 U.S. 641, 659, 10 S.Ct. 965, 34 L.Ed. 295 (1890). Rule 71A provides the procedure for determining just compensation, and ETNG has deposited cash with the court in an amount equal to the appraised value of the interests condemned. If the deposit is somehow short, ETNG will be able to make up the difference. In 2002 ENTG's parent company reported earnings of $1.17 billion from its natural gas transmission division that includes ETNG. There is thus adequate assurance that the landowners will receive their just compensation. *See Wash. Metro. Area Transit Auth. v. One Parcel of Land* 706 F.2d 1312, 1321 (4th Cir.1983) (fact that

agency could be sued and had substantial assets was sufficient to assure just compensation).

The landowners argue that Congress does not intend for gas companies to gain immediate possession because it has not granted statutory quick-take power to gas companies as it has to government officers who condemn property in the name of the United States. This argument overlooks the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress. *See* 28 U.S.C. §§ 2072, 2074. Two rules are pertinent, Rule 65(a) and Rule 71A. Rule 65(a), which specifically allows for preliminary injunctions, was adopted with the original rules in 1937. Rule 71A, the special rule for condemnation actions, came along later, in 1951. As we have already mentioned, Rule 71A does not include any provisions governing the exercise of immediate possession. Rule 71A provides, however, that the regular rules of procedure apply to any subject not covered by the special rule. Fed.R.Civ.P. 71A(a). Under the rules, then, a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession. The gas company must, of course, establish that it is entitled to equitable relief. Congress has never given any indication that it disapproves of this procedure. Indeed, because Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation, we conclude that the rule applies. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) ("Equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.").

The subtext of the landowners' argument that only Congress can grant the right of immediate possession is this: the preliminary injunction process does not provide the landowner with procedural safe-guards that are comparable

to those provided by Congress in the DTA. We disagree. Although the procedural safeguards in the preliminary injunction process are not a perfect match with those in the DTA, a comparison shows that the landowner is adequately protected when the condemnor obtains immediate possession under either procedure. In a DTA case the government exercises its right to immediate possession with minimal judicial oversight. Title and the right to possession vest in the government immediately upon the filing of a declaration and the requisite deposit. *See* 40 U.S.C. § 3114; *Kirby*, 467 U.S. at 4-5, 104 S.Ct. 2187. Although the district court fixes the time and any terms of the possession, the government takes possession of the condemned property as a matter of course, unless the landowner or occupant demonstrates some undue hardship that warrants a delay. *See, e.g., United States v. Certain Land in the Borough of Manhattan*, 332 F.2d 679, 680-82 (2d Cir.1964) (possession delayed when government sought to oust tenants on five days' notice); *United States v. 6,576.27 Acres of Land*, 77 F.Supp. 244, 246 (D.N.D.1948) (eviction delayed when "it would be difficult, if not impossible, for ... farm families to move by the date fixed in the order"). In a condemnation case under the NGA, a gas company that seeks immediate possession has a much stiffer burden than the government does under the DTA. Because title in an NGA case does not pass until compensation is determined and paid, *see Danforth v. United States*, 308 U.S. 271, 284-85, 60 S.Ct. 231, 84 L.Ed. 240 (1939), the company's motion for immediate possession triggers a threshold requirement. The district court must determine that the company has the right to condemn the property in question. *See Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F.Supp.2d 976 (N.D.Ill.2002). Once the right to condemn is established by court order, it follows that the company will be entitled to possession when title is transferred at the end of the case. The question then becomes whether the relief that will be appropriate at the end (that is, possession) should be

granted at an earlier stage. To obtain this intermediate relief, the gas company must satisfy the strict requirements for a preliminary injunction. For example, the company must demonstrate that it will suffer irreparable harm without immediate possession, and the company's harm must be weighed against any harm to the landowner. *See Safety-Kleen, Inc. v. Wyche,* 274 F.3d 846, 859 (4th Cir.2001). In this case ETNG was awarded possession only after it engaged in five months of intensive litigation that analyzed and determined its right to take and its right to equitable relief (an injunction).

In comparing the protections of the DTA to those in injunction proceedings, we return briefly to the matter of title and the payment of just compensation. Again, title passes immediately to the government under the DTA. There is the possibility, of course, that the government, in making its deposit to cover compensation, will underestimate the value of the land. In that case, the landowner is protected because the government undertakes to pay the difference between the adjudicated value of the land and the deposit. *Kirby,* 467 U.S. at 5, 104 S.Ct. 2187. In an NGA condemnation where early possession is granted to a gas company, the landowner is protected in a different way, that is, by "the rule that title does not pass until just compensation has been ascertained and paid." *Danforth,* 308 U.S. at 284-85, 60 S.Ct. 231. Therefore, if the gas company's deposit (or bond) is less than the final compensation awarded, and the company fails to pay the difference within a reasonable time, "it will become a trespasser, and liable to be proceeded against as such." *Cherokee Nation,* 135 U.S. at 660, 10 S.Ct. 965. Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any "damages resulting to the [land] and to fixtures and improvements, or

for the cost of restoration." 4 J. Sackman, Nichols on Eminent Domain § 12E.01 [07] (rev.3d ed). *See also* Fed.R.Civ.P. 71A(i)(3) (district court "shall not dismiss [condemnation] action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken"). For all of these reasons, we conclude that when a gas company initiating a condemnation action under the NGA seeks immediate possession by preliminary injunction, there are sufficient safeguards in place to protect the landowner.

The landowners also argue that because statutes granting the power of eminent domain must be strictly construed, equity cannot be invoked to supply the remedy of immediate possession. This argument is rooted in the principle that "[t]he grant of authority to condemn for specific purposes must be construed as limited to the enumerated purposes." IA Nichols, *supra,* § 3.03 [3][d]. The property in this case is being condemned for the strict purpose authorized by the NGA, to build a pipeline that FERC deems necessary to supply natural gas. Moreover, our circuit has never interpreted the strict construction principle to mean that equity cannot allow for the possession of property condemned under the NGA before a case is finally ended. In *Atlantic Seaboard Corp. v. Van Sterkenburg,* 318 F.2d 455 (4th Cir.1963), a natural gas company sought possession of an easement for a new pipeline while the landowner appealed his award of just compensation. The district court authorized possession conditioned on the company's deposit of the award into the court's registry account. The landowner also appealed the order granting possession, arguing that Rule 71A did not authorize the district court to provide such relief. Our court recognized that Rule 71A did not spell out procedures for the grant of early possession. Nevertheless, our court said that "inherently, the condemnation court possesses the power to authorize

immediate entry by the condemnor upon the condemned premises." *Id* at 460. In upholding the order of early possession, our court observed that a landowner, protected by a deposit, should not be allowed "to postpone the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps irreparable damage, all without risk of further loss or injury to the owner." *Id.* We recognize, of course, that the *Atlantic Seaboard* case was much further along than today's case when possession was authorized. Nevertheless, *Atlantic Seaboard* demonstrates that a court may use its equitable power to authorize early possession.

Finally, the landowners' argument that equity cannot be invoked here ignores the fact that there is a substantial public interest--the need for natural gas supply--at stake in this case. As the Supreme Court has said, courts of equity may go to greater lengths to give "relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Va. Ry. Co. v. Sys. Fed'n No. 40,* 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937). *See also United States v. Morgan,* 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211 (1939); *United States ex rel. Rahman v. Oncology Assocs., P.C.,* 198 F.3d 489, 497 (4th Cir.1999). FERC spent sixteen months evaluating the need for the Patriot Project. Ultimately, it concluded that the project was required by the public convenience and necessity. It was therefore appropriate for the district court to weigh the public benefit of expeditious project construction in deciding that it could use its equitable power in this case.

District courts in a number of jurisdictions have done exactly what the district court did here, that is, grant immediate possession in the form of a preliminary injunction to a gas company that has established its right to condemn under the NGA. *See Northwest Pipeline Corp. v. The 20' by 1,430' Pipeline Right of Way,* 197 F.Supp.2d 1241, 1245 (E.D.Wash.2002)("[w]here there is no dispute about the

validity of [the gas company's] actual right to the easement," denying authority to grant immediate possession "would produce an absurd result"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F.Supp.2d 976, 979 (N.D.I11.2002)(immediate possession proper when condemnation order has been entered and preliminary injunction standards have been satisfied); *N. Border Pipeline Co. v. 64.111 Acres of Land,* 125 F.Supp.2d 299, 301 (N.D.I11.2000)(same); *see also N. Border Pipeline Co. v. 127.79 Acres of Lana* 520 F.Supp. 170, 173 (D.N.D.1981) ("the Court believes the circumstances of this case warrant the exercise of inherent powers"); *Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land,* 2003 WL 21524816 (D.N.D.2003)(same); *Tenn. Gas Pipeline Co. v. New England Power, Inc.,* 6 F.Supp.2d 102, 104 (D.Mass.1998)(same); *USG Pipeline Co. v. 1.74 Acres,* 1 F.Supp.2d 816, 825- 26 (E.D.Tenn.1998) (same); *Kern River Gas Transmission Co. v. Clark County,* 757 F.Supp. 1110, 1117 (D.Nev.1990) (same); *Humphries v. Williams Natural Gas Co.,* 48 F.Supp.2d 1276, 1280 (D.Kan.1999)("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *Rivers Electric Co., Inc. v. 4.6 Acres of Land,* 731 F.Supp. 83, 87 (N.D.N.Y.1990)(granting immediate possession under a statute similar to the NGA). *Cf. Commercial Station Post Office, Inc. v. United States,* 48 F.2d 183, 184-85 (8th Cir.1931)(holding that government officer who exercises statutory authority to file condemnation action may take immediate possession of the property even though there is no express provision authorizing pre judgment possession).

One circuit case, *Northern Border Pipeline Co. v. 86.72 Acres of Land,* 144 F.3d 469 (7th Cir.1998), has held that a district court lacked authority to grant a condemnor immediate possession under the NGA. But that case involved an entirely different set of circumstances than those presented

here. Specifically, the gas company in *Northern Border* did not obtain an order determining that it had the right to condemn before it sought a preliminary injunction. Its motion for an injunction was based entirely on the existence of a certificate of public convenience and necessity. Under those circumstances, the Seventh Circuit held that the gas company had no right to equitable relief because the company "did not present an argument grounded in substantive law establishing a preexisting entitlement to the property." *Id* at 472. Two district court decisions in the Seventh Circuit have interpreted *Northern Border* to mean that immediate possession is improper only when there has been no order confirming the right to condemn. *N. Border Pipeline Co. v. 64.111 Acres of Land* 125 F.Supp.2d 299, 301 (N.D.Ill.2000)("in this case, plaintiff does have a preexisting entitlement to the easements, the judgments of condemnation, which make an award of possession appropriate"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F.Supp.2d 976, 979 (N.D.Ill.2002) (same). We agree with the assessment of the two district courts. The gas company in *Northern Border* had simply failed to seek an order determining that it had the right to condemn. Without having that right in substantive law determined, the company could not invoke equity.

In summary, the district court followed established principles of equity in determining that it had the power to award preliminary injunctive relief to ETNG in the form of immediate possession. Neither the Constitution, nor Congress, nor Rule 71A bars this sort of relief in a condemnation case. In this case, the public interest factor--the need for natural gas in a region with little or no service--made it especially appropriate for the district court to consider equitable relief that would allow expeditious construction of the pipeline. A number of district courts around the country have also determined that they have the equitable power to grant immediate possession to a gas

company filing a condemnation action under the NGA. We agree with this position. Accordingly, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.

III.

Because the district court had the authority to grant immediate possession through a preliminary injunction, we must consider the landowners' alternative argument that ETNG does not satisfy the basic requirements for a preliminary injunction. We review the decision to grant a preliminary injunction for abuse of discretion. Factual determinations are reviewed for clear error and legal conclusions de novo. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir.2001). In deciding whether to grant a preliminary injunction, a court should consider (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir.1977). The district court issued preliminary injunction orders that mandated affirmative relief (immediate possession) to ETNG. We have said that "[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir.1980). *See also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir.2003). We will now review the district court's preliminary injunction decision, starting with the *Blackwelder* factors.

1. *The likelihood of irreparable harm to ETNG.*

The district court found that without a preliminary injunction the Patriot Project would suffer "undue delay" and that this delay would cause "significant financial harm both to ETNG and some of its putative customers." J.A. 78. This finding has ample support in the record. The court pointed out that separate hearings on compensation would be required for each of the eighty-five tracts involved. Scheduling and conducting those hearings, the district court noted, "will obviously take an extended period of time." J.A. 78. ETNG estimated that if possession on some tracts was deferred until completion of the hearings, construction could be delayed until the Summer of 2004 or beyond. Constructing a ninety-four-mile pipeline is a complex project that can only progress in phases. Certain portions of the project have to be completed before construction can begin on other portions. Therefore, as the district court recognized, "any single parcel has the potential of holding up the entire project." J.A. 78. Continuing, the court said, "[t]o require ETNG to build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side would prove wasteful and inefficient." *Id.* Furthermore, ETNG is under an order from FERC to complete construction and have the pipeline in operation by January I, 2005. It would not be possible to meet FERC's deadline without a preliminary injunction.

ETNG is also under contractual obligation to provide natural gas to several electric generation plants and local gas utilities by certain dates. Without a preliminary injunction, ETNG would be forced to breach these contracts. ETNG's inability to satisfy these commitments would have negative impacts on its customers and the consumers they serve. For example, two electric generation plants will not be able to operate at full capacity without natural gas from the Patriot Project. A North Carolina gas utility may not be able to meet

its customers' demand for gas if ETNG does not complete the project on time. ETNG estimates that it would lose in excess of $5 million if construction delay caused it to breach its contractual obligations to supply gas. Finally, delay in the construction of the pipeline would hinder economic development efforts in several Virginia counties.

2. *The likelihood of harm to the landowners.*

[The landowners claim that ETNG's early possession will disturb the productive capacity of their land. This is simply a timing argument because productive capacity would still be disturbed, albeit at a later time, if just compensation was determined first. In any event, as the district court observed, the early loss of use argument "is blunted by [the landowners] right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal," that is, an independent appraisal obtained by the company. J.A. 78-79. The landowners also argue that by awarding ETNG early possession, the district court undermined their ability to negotiate a favorable price for their land. This argument is unconvincing because the Fifth Amendment guarantees the landowners just compensation for their land no matter when the condemnor takes possession. Finally, the landowners argue that taking property before determining just compensation constitutes a type of inherent harm that is irreparable, especially when lands have been held in the same family for many years. We fully understand that condemnation often forces landowners to part with land that they would prefer to keep for many reasons, including sentimental ones. However, the Supreme Court long ago recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it ... is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S.Ct.

1434, 93 L.Ed. 1765 (1949). In the end, the district court concluded that the harm to the landowners due to early possession is "slight at best." J.A. 79. The record supports this conclusion, and any harm to the landowners is clearly outweighed by ETNG's immediate need for the property.

3. *The likelihood that ETNG will succeed on the merits.*

ETNG has a determination on the merits that it has a right to condemn the landowners' property, and the landowners now concede that ETNG possesses this right. Success on the merits for ETNG is therefore apparent.

4. *The public interest.*

[The district court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79. Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145-46 (3d Cir.1977); *Fla. Power & Light Co. v. Federal Energy Regulatory Comm'n, 598* F.2d 370, 379 (5th Cir.1979); *Public Serv. Comm'n of Ky. v. Federal Energy Regulatory Comm'n*, 610 F.2d 439, 442-43 (6th Cir.1979). As the district court observed, FERC conducted a careful analysis of the Patriot Project and determined that the project will promote these congressional goals and serve the public interest. The project serves the public interest because, among other things, it will bring natural gas to portions of southwest Virginia for the first time. This will make gas available to consumers, and it will help in the efforts of local communities to attract much-needed new business. On a larger scale, the pipeline will make gas available for electric power generation plants. A delay in construction would postpone these benefits.

Because our review must be "more searching when the preliminary injunctive relief ordered by the district court is mandatory," *Microsoft Antitrust Litig.*, 333 F.3d at 525, we will consider whether the circumstances are sufficiently demanding for the award of mandatory relief. We conclude that they are. First, ETNG's right to take the easements for the Patriot Project is indisputably clear, as the district court determined. Second, a federal agency, FERC, determined that the project is necessary to serve the public interest, specifically, the public need for natural gas in areas that have no gas service or that are underserved. To assure that these needs are met in good time, FERC has ordered ETNG to complete the project by January 1, 2005. Third, ETNG could not meet FERC's deadline without immediate possession. And without this mandatory relief, ETNG would face other irreparable harm such as increased construction costs and losses from its breach of gas supply contracts. Preliminary injunctive relief of a mandatory nature was therefore appropriate in these cases.

After considering the *Blackwelder* factors and the propriety of mandatory relief, we conclude that the district court did not abuse its discretion in entering the preliminary injunction orders in these cases.

IV.

Some of the landowners argue that the district court lacked jurisdiction over their cases because ETNG's condemnation complaints did not sufficiently identify the property to be taken. Rule 71A(c)(2) requires a condemnation complaint to include "a description of the property sufficient for its identification." Fed.R.Civ.P. 71A(c)(2). Each of ETNG's complaints provides a legal description of the tract of land through which the pipeline will run and a detailed plat showing the location of the easement. In instances where construction considerations have required a change in

location, amended plats have been filed with the district court and provided to the landowners. All of this is sufficient to satisfy Rule 71A(c)(2) and any jurisdictional requirement relating to property descriptions. *See S. Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1375 (11th Cir.1999); *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land,* 210 F.Supp.2d 971, 975 (N.D.Ill.2002).

V.

In sum, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction. Because the district court did not abuse its discretion in granting preliminary injunctive relief to ETNG in these cases, we affirm the district court's orders.

AFFIRMED.

FILED: July 9, 2003
[ENTERED: July 9, 2003]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1708 (L)
(CA-02-170-4)

EAST TENNESSEE NATURAL GAS COMPANY,

Plaintiff - Appellee,

versus

JOHN F. SAGE; LINDA K. SAGE,

Defendants - Appellants,

and

1.20 ACRES IN WYTHE COUNTY, VIRGINIA;
MARY CASEL, Commissioner of Revenue;
JOHN DOE, et al.; UNKNOWN OWNERS

Defendants.

O R D E R

Appellants have filed a motion for stay and a motion for oral argument on the stay. Appellee has filed a response in opposition to the motion for stay. Appellants have filed a motion to expedite appeal, and appellee has filed a response.

The Court denies appellants' motion for stay and motion for oral argument on the stay. The Court grants appellants' motion to expedite the appeal. The Clerk is directed to establish an expedited briefing schedule. This case is tentatively calendared for oral argument at the September 23-26, 2003, session of Court.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Michael and Judge Motz.

For the Court
/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,	)	Case No. 4:02cv00125
Plaintiff,	)	**SUPPLEMENTAL MEMORANDUM OPINION**
v.	)	
VARIOUS PARCELS OF LAND,	)	By: Jackson L. Kiser Senior United States District Judge
Defendants.	)	

FILED: June 6, 2003
[ENTERED: June 6, 2003]

I. Factual Background

On February 28, 2003, the Court heard oral argument on the East Tennessee Natural Gas's ("ETNG" or "plaintiff') motion for immediate possession, and on March 4, 2203, I took the motion under advisement until I had considered the question of whether ETNG had been granted the power to condemn the defendants' property. On May 8, 2003, the Court entered an opinion and order granting ETNG's motions for possession which addressed the various arguments of the defendants as to ETNG's power to exercise its right of eminent domain. What I failed to address at that time, however, were the defendants' deferred arguments against ETNG's immediate possession of the various parcels of land.

II. Parties' Contentions

The arguments consist of two basic assertions:

1. The Natural Gas Act ("NGA") does not contain a provision for immediate possession.

2. Immediate possession can be granted to ETNG only by the exercise of the Court's equitable powers and it would be inequitable for the Court to grant ETNG immediate possession. I will address the arguments in turn.

III. Analysis

The defendants are correct and ETNG agrees that there is no grant of the right to immediate possession in the NGA. *See Northern Border Pipeline Co. v. 127.79 Acres of Land,* 520 F. Supp. 170 (D.N.D. 1981). Moreover, the defendant's argue that because Congress did not include the right in the NGA (as it has in other statutes, *see* 40 U.S.C. § 3114, the Declaration of Taking Act), an exercise of the Court's equitable powers to grant the right to early possession would be, in effect, amending the Act and thereby usurping the legislative powers of Congress. *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Immediate Possession at 3-7. With all due respect, I disagree with this rationale. As I see it, Congress did not give a private condemnor the right to immediate possession so that this issue would be left to the courts to consider on a case-by-case basis. By so doing, the condemnor would be under the supervision of the court rather than having carte blanc authority to enter the property. Thus, Congress entrusted the issue of immediate possession to the equitable powers of the Court. *Atlantic Seaboard Corporation v. Van Sterkenburg,* 318 F.2d 455 (4th Cir. 1963) ("Inherently, however, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises"); *Tenn. Gas Pipeline Co. v. New England Power,*

C.T.L., Inc., 6 F. Supp.2d 102, 104 (D. Mass.1998) ("[T]he district court does have the equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule."); *see Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F.* Supp. 170, 172 (D.N.D. 1981). This brings me to the next argument of the defendants as to whether the Court should use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction. I think it should.

Although no court in this circuit has considered the issue of immediate possession after the plaintiff's power of condemnation has been affirmed but before compensation has been awarded, other districts have done so and have found that the court's inherent powers extend that far as long as the plaintiff is able to meet the requirements for injunctive relief. *See generally Northwest Pipeline Corp. v. The 20'x 1,430' Pipeline Right of Way Easement 'x 1560' Temporary Staging Area, 197* F. *Supp.2d* 1241 (E.D. Wash. 2002); *Northern Border Pipeline Co. v. 64.111 Acres of Land,* 125 F. Supp.2d 299, 301 (N.D. Ill. 2000); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6* F. Supp. 2d 102, 104 (D. Mass.1998); *USG Pipeline Co. v. 1.74 Acres of Land,* 1 F. Supp. 2d 816 (ED. Tenn. 1998).

In the Fourth Circuit, the standard for injunctive relief has long been the four-part test set forth *in Blackwelder Furniture Company of Statesville, Inc., v. Selig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977).. That test requires the district court to determine "(1) the likelihood of irreparable harm to the plaintiff if preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits and (4) the public interest" *Direx Isreal. Ltd., v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991); *see Blackwelder,* 550 F.2d at 193-95.

In weighing the harm to the plaintiff against the harm to the defendant, the third factor, plaintiff's likelihood of success plays an important role. If the plaintiff's likelihood of success is great, the extent of the harm he may suffer need be only slight. Conversely, if plaintiff's likelihood of success is slight, then the hann he may suffer must be great. The corollary to this is that where the plaintiff's likelihood of success is great, the defendant's harm must be great.

The issues as to whether ETNG had the power and the right to condemn the various parcels of land were resolved in the Court's May 8 opinion and order. Thus, element 3 of the *Blackwelder* test --- plaintiff's likelihood of success - is not open to speculation. Plaintiff has already prevailed on that issue. Consequently, plaintiff need only show slight harm and defendant must suffer great harm. I find that an extended delay would harm the plaintiff. Of the numerous parcels of property involved in the project,[1] only the ones under consideration have not permitted the commencement of construction. To require ETNG to build up to a parcel of land they do not possess, skip that parcel, and then continue on the other side would be inefficient and wasteful. Moreover, it would cause undue delay and "significant financial harm" both to ETNG and some of its putative customers. Affidavit of Rick Smith, ¶ 6.

Defendants argue that there is a legal remedy for delay expenses and, therefore, a cause in equity does not lie. I disagree. The argument would be more persuasive if there were but a single parcel of land involved, such as *National Fuel Gas Supply v. 138 Acres,* 186 F. Supp. 2d 339 (W.D.N.Y. 2001), but here there is a series of parcels owned by different landowners and any single parcel has the potential of holding up the entire project. There remains some 85 parcels

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[1] In the Commonwealth of Virginia, ETNG has brought condemnation actions against 133 parcels.

that will be the subject of a just compensation before a commission. Obviously, that will take an extended period of time. To delay the project's completion until the compensation for the last parcel is determined would be inequitable. Plaintiff has demonstrated more than slight harm.

The defendants are unable to prove that they would suffer great harm. The only harm the defendants have shown is a delay in having their compensation determined before surrendering possession of their property. Even this is blunted by their right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal. The defendants' harm is slight at best.

Part four of the *Blackwelder* test - public interest - was resolved by FERC insofar as the pipeline being in the public interest is concerned. FERC also conditions its certificate to try to address the concerns of the landowners. FERC, having determined the need for the pipeline and the conditions under which it could be built, it seems to me that an expeditious completion of the pipeline is in the public interest.

IV. Conclusion

Taking all of this into account, I find that ETNG has met all four requirements under *Blankwelder*. In doing so, it has established a right to immediate possession of the delineate easement on the defendant's property. Therefore, the orders granting immediate possession were appropriately entered.

/s/ Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

EAST TENNESSEE NATURAL GAS CO.,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 4:02cv00125
2.26 ACRES IN CARROLL COUNTY, VIRGINIA, MAYNARD R. JOYCE, JANE A. HARRISON, COUNTY ASSESSOR, JOHN DOE, et al. And UNKNOWN OWNERS, Defendants.	)	

FILED: May 30, 2003
[ENTERED: May 30, 2003]

ORDER GRANTING POSSESSION

East Tennessee Natural Gas Company filed its complaint for condemnation in the above-entitled proceedings, in which it is prayed that this Court enter an order granting to it immediate possession of the lands described in the Complaint. As set forth in detail in the Order and Memorandum Opinion filed on May 8, 2003, ETNG has established its right to exercise eminent domain over the Defendants' property as outlined in the Certificate of Public Convenience and Necessity ("Certificate"), and thus its motion for immediate possession should be granted. ETNG shall comply with all general conditions applicable to Defendants' property as set forth in the Certificate. The Certificate does not contain any conditions that are unique to this property.

It is hereby ORDERED that East Tennessee Natural Gas Company be put into immediate possession of the property sought to be condemned in the above-entitled action, and that the defendants in such action surrender possession of the said property to East Tennessee Natural Gas Company accordingly. The United States Marshall's office is ordered to aid the Plaintiff in enforcement of this Order as necessary.

Done this 30th day of May, 2003.

/s/ Jackson L. Kiser
JACKSON L. KISER
SENIOR UNITED STATES DISTRICT JUDGE

SUBMITTED FOR ENTRY:

/s/ Stephen W. Earp
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Attorneys for Plaintiff East Tennessee Natural Gas Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following parties by U.S. Mail, postage prepaid, this 12th day of May, 2003:

Joseph T. Waldo
Joseph L. Lyle, Jr.
Waldo & Lyle
301 West Freemason Street
Norfolk, VA 23510

/s/ Stephen W. Earp

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,	) Case No. 4:02CV00125
Plaintiff,	) **MEMORANDUM OPINION**
2.26 ACRES IN CARROLL COUNTY,	) By: Jackson L. Kiser Senior United States
Defendants.	) District Judge

FILED: May 8, 2003
[ENTERED: May 8, 2003]

I. Factual Background

On November 22, 2002, the Federal Energy Regulatory Committee ("FERC") granted the petitioner, East Tennessee Natural Gas Company ("ETNG"), a Certificate of Public Convenience and Necessity ("Certificate") to construct an integrated interstate gas pipeline through eastern Tennessee and western Virginia. This endeavor, referred to as the "Patriot Project," authorizes the installation of 93.6 miles of 24-inch diameter pipeline through Carroll, Floyd, Henry, Patrick, and Wythe Counties, Virginia. The Certificate was issued after a hearing was conducted by FERC after the statutorily required notice was given.

The Certificate thoroughly covers all of the procedures and conditions that ETNG must adhere to in constructing the pipeline, including:

1. Following procedures and mitigation measures outlined in its application and environmental impact statement;

2. Filing detailed alignment maps and aerial photographs of all proposed facility locations, route realignments, staging areas, pipe store yards, and new access not previously identified;

3. Filing an initial Implementation Plan with the Secretary describing how ETNG will implement EERC's mandates, including procedures for training and compliance;

4. Employing two environmental inspectors per spread on the Patriot Extension to monitor compliance with all requirements;

5. Filing weekly status reports with FERC listing status changes, problerns and noncompliance encountered, and corrective actions;

6. Filing revised tables with FERC after surveying individual property tracts;

7. Survey land before blasting for structures that may be affected and giving landowners 24-hour notice of blasting;

8. Installing temporary erosion controls after disturbing soil;

9. Providing compaction testing of topsoil and subsoil;

10. Monitoring vegetation for at least two growing seasons;

11. Monitoring water quality and yield of wells within 150 feet of pipeline activities;

12. Ensuring property is cleaned and restored within ten days of backfilling of trench;

13. Planning for notification of landowners when their property is traversed and when testing is to be done and informing them of dates and procedures;

14. Limiting construction times to daylight hours;

15. Identifying septic systems, avoiding them where possible, and removing and replacing system when unable to avoid;

16. Limiting construction activities to the are of the permanent easement; and

17. Providing each landowner with a Construction Alignment Sheet showing the construction area and other pertinent information.

Certificate of Public Convenience and Necessity, Appendix ¶ 1-55. FERC also mandates that any changes other than "minor field realignments per landowner needs and requirements" be reported to the Secretary and receive review and approval by the Director of the Office of Energy Projects. *Id.* at ¶ 5.

After receiving the Certificate, ETNG immediately made a motion for possession on the land that it had been unable to acquire through negotiations. On December 12, 2002, ETNG moved for immediate possession, and the court heard oral arguments on the issue on February 28, 2003. On March 4, 2003, I entered an order taking the motion for immediate possession under advisement and bifurcating the case to consider ETNG's right to condemnation first and then assign all compensation issues to a commission as allowed by Rule 71A. The parties were given deadlines to file brief dealing with the issue of the plaintiffs power to condemn and oral argument on the issue was heard on April 10, 2003. The sole purpose of this opinion is to address the plaintiff's right to condemn the defendants' property. While the court recognizes that these cases have not been consolidated, in the interest of judicial efficiency I have incorporated all claims into a single opinion.

II. Motion for Possession

The defendants' defenses to the plaintiff's case can be condensed to three major issues, one of which can be broken down further. First, they contend that the plaintiff s complaint is fatally defective in that it fails to adequately describe the property that is being condemned. Second, they argue that ETNG has failed to properly comply with substantive state law. Specifically, they state that the plaintiff has (1) failed to follow Va. Code § 25-248 which mandates that landowners "be given an opportunity to accompany the appraiser during his inspection of the property; (2) that ETNG violated Va. Code § 25-46.5 by not giving the landowners written statements of the valuation process or a copy of the condemnor's appraisal; and (3) that ETNG has not bargained in good faith with the landowners as required by Va. Code § 25-46.5 and 15 U.S.C. § 717f(h). Finally, some of the defendants have offered individualized claims arguing that the court should change or enforce the

duties established in the FERC Certificate, and at least one set of landowners contend that granting ETNG's motion for possession would violate the Takings Clause of the Fifth Amendment and their Due Process rights. I will address each of these claims in turn.

A. ETNG has failed to adequately describe property

Certain of the defendants contend that ETNG has not filed a properly pled complaint, which they argue is a 'jurisdictional prerequisite" to this court's authority. They argue, quoting the state code and state case law, that ETNG is violating their clients due process rights by not being specific enough about the easements it is seeking.[1] To support their arguments, the defendants point to *United States v. Causby, 328* U.S. *256, 267 (1945),* the famous "airplanes over the chicken farm" case, which they point out states that "an accurate description of the property taken is essential." In that case, the Court disagreed with the Court of Claims contention that the government had taken an easement by allowing planes to fly over the defendant's property. The error, according to the Court, was that there was no findings made as to the altitude, frequency, type of aircraft, or whether the easement was temporary or permanent. The Court pointed to federal statutes that required findings of fact and concluded that it was "premature" for them to make a review of the Court of Claim's compensation award until they knew whether the easement was temporary or permanent. The posture and timing of *Causby* make it easily differentiable from the case at hand. First, the Court did not find that there was any defect in the pleading, which it could not have since the Government had been the original defendants, but it only

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[1] Note that this lack of specificity also plays into the defendants' defense that ETNG has not negotiated in good faith. The argument goes that no landowner can reasonably assess or reply to an offer unless they know what it is for.

stated what findings the district court was required to make before establishing compensation. Second, this case took place six years before Congress adopted Rule 71A, which means that the statutes requiring specific factual findings have now been superceded.

The defendants admit that ETNG has included a surveyed plat map to give the specifics of the easement, but they claim that it is deficient for the purpose because ETNG admits on the survey that the "actual location of easement is determined by the pipeline as installed." If the location is not definitely known, the defendants point out, then the landowners have not been given adequate notice. For example, the pipeline could be projected through unused, low-value land and could end up going through used, higher-valued land. They assert that since the claims fail to meet the jurisdictional requirements, the cases should be dismissed.

While there does not appear to be any Fourth Circuit precedent on this specific issue, other courts have decisively addressed it. In *Southern Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1375 (11th Cit. 1999), the court held that a legal description of the property and a plat map showing the placement of the pipeline were sufficient to identify the property under Rule 71A(c)(2). *See Guardian Pipeline, L.L. C. v. 529.42 Acres of Land, 210* F. Supp. 2d 971, 975 (N.D. Ill. 2002) (" [L]egal descriptions and plat maps easily satisfy the federal requirement that a condemnation complaint include a description for the property sufficient for its identification."). The proposed route of the pipeline was enough, even if the final easement was different. *See USG Pipeline Co. v. 1.74 Acres in Marion County, TN, 1* F. Supp. 2d 816, 823, 825 (E.D. Tenn. 1998) (noting that gas company did not tell landowners "precisely where on their property the pipeline would run," yet finding no statutory authority to do so).

It would be illogical to assume that the pleading requirements would set a higher standard than the substantive statutory requirements of the "Natural Gas Act" ("NGA"). Also, I believe it is important to remember that part of the reason that ETNG cannot provide a more specified determination of the location of the easements is clue to the fact that the defendants have denied them the opportunity to. survey their land to determine possible obstructions.

It is import to note that the landowners also are protected by the necessities of procedure. FERC has granted an easement to ETNG to lay pipeline across specific property. It is clear from the order that any changes to the proposed route or requirements will have to be approved by the Director of the Office of Energy Projects. To obtain a new easement, ETNG will have to start fresh, getting the approval of FERC, negotiating with the landowner, and then beginning a new condemnation proceeding if it is unable to come to terms with the landowner. As ETNG noted during the hearing, in that case the defendants will still receive their due process and will likely get paid twice for one pipeline.

B. Failure to comply with state substantive law

The question of whether state or federal law governs appears confusing, but I believe it is relatively easy to disentangle. The defendant's contend that Virginia has laid down statutory provisions to protect the rights of landowners. They further argue that these laws do not directly conflict with the implementation and purpose of the NGA, so they should be followed according to § 717f(h) of that Act which states: "[T]he practice and procedure in any action or proceeding for [the purpose of eminent domain] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action

or proceeding in the courts of the State where the property is situated ...." 29 U.S.C. § 717f(h). As such, the defendants claim that before it can successfully seek condemnation under Rule 71A, ETNG must follow Virginia law which requires, among other things, that the landowner be allowed to accompany the company's surveyor and that the condemnor provide the landowner with a copy of the appraisal and explain how valuation was determined.[2]

While I can find no evidence of this or any other federal court addressing these specific statutory requirements, there is plenty of case law that disputes the defendants' assertion that ETNG must follow Virginia law. The defendants admit that Rule 71A preempts state procedural law, but they insist that state substantive law must be followed under the NGA. The question, then, is whether Rule 71A, which was enacted in 1951, supercedes the "practice and procedure" requirement of the earlier-enacted NGA. Case law clearly states that it does.

In *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 4 n.2 (1984), the U.S. Supreme Court held that Rule 71A superceded the Condemnation Act. Since that time, courts considering the issue have held the NGA to the same standard. *See Southern Natural Gas*, 197 F.3d at 1374 ("Rule 71A, not the practice and procedure language of § 717f(h) and not state law, governs the proceedings in the instant case); *Alabama Power Co. v. 1354.02 Acres, More or Less, of Land in Randolph County, Ala.*, 709 F.2d 666 (11th Cir. *1983);USG Pipeline*, 1 F. *Supp.* 2d *at 827; see also* Rule 71A, Advisory Committee Notes ("Rule 71A . . . supplants all statutes proscribing a different procedure."). As the court stated in *Guardian Pipeline*, "state and local laws cannot be

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[2] The defendants spent the majority of the rest of their brief explaining how by ignoring Virginia law the court would be creating improper federal common law. I believe that this argument only distracts from the true issue and its resolution.

used to prohibit or unreasonably delay the construction of the approved pipeline." 210 F. Supp. 2d at 975.

In considering the issue of whether defendants were entitled to a trial before a commission in accordance with Virginia law, the Fourth Circuit stated that "state law is made applicable only when no federal law is applicable," and the court found "no hiatus in federal law requiring resort to the laws of Virginia." *Washington Metro. Area Transit Auth. v. Two Parcels ofLand in Fairfax County, Virginia,* 569 F.2d 816 (4th Cir. 1978). More recently, one district court from this circuit has stated that federal law "governs all procedural and most substantive matters arising in a federal condemnation proceeding." *United States v. 7,216 50 Acres of Land,* 507 F. Supp. 228, 235 (D.C.S.C. 1980). Other federal courts have considered the question of the application of state law under the NGA and have routinely held that clause has been preempted by Rule 71A. *See Southern National Gas Co. V. Land, Cullman County,* 197 F.3d *1368, 1372* (11th Cir. 1999); *Scully v. U. S.,* 409 F.2d 1061 (10th Cir. 1969) (stating that determination of type and extent of property interest taken upon exercise of federal power of eminent domain is governed by federal law); *Northwest Pipeline Corp. v. The 20' x 1,430' pipeline Right of Way easement,* 197 F. Supp. 2d 1241, 1244 (RD. Wash. 2002) ("[T]he explicit language of the Natural Gas Act regarding the use of state law has been repealed by implication through the adoption of Rule 71A . . . "); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement,* 747 F. Supp. *401,* 404 (N.D. Ohio 1990) ("The Court concludes that the State of Ohio has no power to regulate, directly or indirectly, a natural gas storage field certified by the Federal Energy Regulation Commission.")..

In *Natural Gas Pipeline Co. of America v. Iowa State Commerce Comm'n,* 369 F. Supp. 156 (S.D. Iowa 1974), the court considered a case with facts very similar to those presented here. In that case, a private gas company sought

declaratory and injunctive relief against enforcement of a state statute that governed permit procedures for underground pipelines. The statute in question required all pipeline companies to hold informational hearings for all affected landowners at least 30 days prior to requesting a permit from the State and prohibited negotiations for real estate before the hearings had taken place. The court determined that the State's informational meeting requirement could not apply to companies who were seeking eminent domain under federal procedures.[3] *Id.* at 160.

The defendants claim that by rejecting their argument that individual landowners must be given the opportunity to accompany ETNG appraisers, this court would be improperly establishing a federal common law instead of relying on state law. To support their argument, the rely on *Georgia Power Co. v. 138.30 Acres of Land,* 617 F.2d 1112 (5th Cir. 1980), and *Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* 962 F.2d 1192 (6th Cir. 1992), two cases in which the court reversed a district court's decision due to the fact that the judge-appointed commission had based its compensation valuation on federal common law and not the relevant state law. In each case the courts noted that the statute did not specify the proper rule of decision and iterated that it was thus the duty of the judiciary to formulate a usable valuation policy. Relying on the principles of federalism, the courts determined that state law should be used "unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law." *Georgia Power,* 617 F.2d at 1115-16.

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[3] The court did not specifically rule on the breadth and constitutionality of the statute as it applied to federal eminent domain procedures, but recognized that the State had conceded that if the statute were construed to include federal procedure then it would violate the Interstate Commerce and Supremacy Clauses of the United States Constitution. *Id.* at 160.

While I agree that the principles of federalism should be protected whenever possible, there are important differences between these two cases and the instant situation that negate the need to resort to creation of a federal common law. First, in each of these cases the issue dealt with compensation, not with the power to condemn. Second, and most important, the courts in these cases were forced to pick some valuation method, while here the court is faced with the choice of adding new and unnecessary procedure. To put is simply, due to a hole in the statute the courts in the relied-upon cases had to adopt some method of valuation or they could not properly compensate the landowners. This court is faced with no such dilemma. Here the defendants are seeking to add a new and supplementary duty to ETNG's grant of eminent domain, something I refuse to do. By rejecting the defendants' argument this court is not choosing federal common law over state law, but is merely refusing to graft a new requirement to those mandated by FERC. See Wright, Miller & Kane, *8 Federal Practice & Procedure 2d*, § 3042, pp. 193-94 (1997) ("Federal condemnation - as contrasted with cases invoking a state's power of eminent domain - is governed by federal law, and state decisions and statutes are neither controlling nor persuasive. This applies to the power of condemnation, [and] the procedure for condemnation ....").

Rule 71A was enacted to make uniform eminent domain procedure in the federal courts. To graft state rules on to it would frustrate the purpose of the statute. The defendants have suggested that refusal to enforce state substantive law could lead to the inequitable results in a situation where one landowner could be forced to defend against condemnation in a state court with the protective requirements of state law, while his neighbor could be taken to federal court by the same plaintiff and lose those state protections. While this may be true, there are uniformity benefits to refusing to rely on state law in

condemnation actions under the NGA. In a case such as this, where the pipeline extends through more than one state, federal court defendants will avoid the situation where their substantive rights are determined by which side of the border they live on. I do not believe that striking down the established rule would result in a less uniform distribution of rights.

In light of these cases, there appears to be adequate authority to support the premise that the defendants cannot stop ETNG's condemnation action on the grounds that the plaintiff did not comply with Virginia state law.[4]

C. Failure to negotiate in good faith

Some of the defendants have argued that the motion should be dismissed because of the failure of ETNG to negotiate in good faith with the landowners before commencing this action. Section 717f(h) of the NGA states the condemnor must demonstrate that it "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the interest of the sought property. 15 U.S.C. 717f(h). Some courts have translated this to require that the holder of a FERC certificate negotiate in good faith with the appropriate owners.[5] *See, e.g., USG Pipeline Co.*, 1 F. *Supp.* 2d at 822; *Transcon. Gas Pipe Line Corp.*, 745 F. Supp. at 369. What actions are necessary to meet this standard are unclear, and the defendants have been unable to point to any federal case where

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[4] The defendants are correct in stating that the state law does have a role to play in the protection of property rights. State law defines the existence and extent of any property interests, but once an interest is determined federal law dictates how the property may be attached. *See US. v. Rollin*, 264 F.3d 391, 423-24 (4th Cir. 2001).

[5] The defendants here do not point to the NGA, but instead rely on § 25-46.5(A) of the Code of Virginia. As discussed above, federal law controls these issues.

condemnation was delayed or denied due to a question over good faith negotiations. *See Guardian Pipeline, 210* F. Supp. at 973 (noting "judicial gloss" of good faith negotiation and lack of enforcement).

In *USG Pipeline,* the court first suggested that the existence of *the* suit itself proved the inability of the plaintiff to acquire the property by negotiation. The plaintiff detailed the actions it took with regard to negotiations during an evidentiary hearing, which included testimony from field agents on how they had valued the land and on the "discussions" they had with each of the owners. The court noted that the complaints of the landowners were that the path of the easement was uncertain, the compensation offered was too low, the easement would devalue the surrounding land, they were opposed on principle to the pipeline, they did not believe in the government's power of eminent domain, or they just thought they were given "take it or leave it" offers. The court noted that despite their concerns, the owners did not attempt to ascertain the pipeline route and generally did not make counteroffers or follow up at all on the company's offer. The court found that the company had made reasonable efforts to ascertain local land values and negotiate with the landowners.

The defendants point to the letters received from ETNG that seem to be nothing more than a "column of seemingly randomly-chosen dollar figures," and claims that there is no hint of valuation procedures taken that would allow the owners to negotiate. They also claim that future letters changed the amount offered and the shape of the easement. The plaintiff contends that it has more than met the necessary statutory requirements and have settled with over 95% of the landowners, but the remaining defendants

are just seeking to force ETNG to abandon its project.[6] It would seem that in each case ETNG has made at least one offer to the defendant and the defendant has refused that offer.[7] While there is some dispute over what the offers covered and how ETNG arrived at the asked figure, there is no indication that ETNG was acting in anything less than good faith. The easement measurements were delineated in the provided plat, and it seems to me that the only figure the defendants needed was not the value an appraiser placed on the land, but was instead the value the defendants themselves valued it. Put simply, ETNG could have meticulously detailed how it arrived at its offer price, but if the landowner felt the land was worth more than the asked for amount, he or she would not sell.

While I am of the opinion that ETNG has established that it has negotiated with the defendants in good faith, I do not believe that the plaintiff should be held to this standard. In the recent case of *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land,* 210 F. Supp. 2d 1253 (D. Kan. 2002), the court examined the good faith requirement and found it to be lacking. *Kansas Pipeline* concerned the renewal of a year-to-year lease by a natural gas pipeline company that allowed it to maintain two dehydration units on the landowner's property. The company inadvertently neglected to renew its lease and the landowners informed it that the lease was terminated. After failing to obtain a new lease or to buy the property from *the* owners, the company, which held a FERC certificate for the line, exercised its power of eminent domain. As its defense, the landowner

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[6] Certain defendants point to the requirement under Virginia law that "imposes an obligation of good faith in [the] performance or enforcement" of any contract. Va. Code § 8.1-203 (Michie 2001). As I have state above, however, I believe that the substantive issues in this case are controlled by federal law.

[7] Many of the current defendants dispute ETNG's right to condemn their property making negotiation difficult if not impossible.

claimed that the company had failed to negotiate in good faith. The court disagreed, finding that those courts that had adopted the good faith requirement had failed to explain why they had done so. The court noted that nothing in the NGA requires the holder of a FERC certificate to negotiate in good faith, just that the party seeking to condemn "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the property interest. *Id.* at 1257 (quoting 15 U.S.C. § 717f(h)).

I find the *Kansas Pipeline* Court's reasoning to be persuasive. Nothing in the NGA or Rule 71A requires a potential condemnor to negotiate in good faith. The defendant's themselves have recognized that "one is to look first at [the statute's] language .... Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *North Dakota v. United States,* 460 U.S. 300, 312 (1983). Other than their misplaced reliance on state law, the defendants have failed to give me a reason to read a good faith requirement into the statutory scheme. ETNG has established that it has been unable to acquire the needed property by contract, and that is sufficient to meet the burden established by the NGA.

D. Claims for Individualized Relief

Several of the defendants have included claims relating to the "unique characteristics" of their property, the amount and timing of compensation, and the requirements made by FERC in the Certificate. The sole jurisdiction of the district court in this matter is "to evaluate the scope of the certificate and to order condemnation of the property as authorized in the certificate." *Tennessee Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence County,* 749 F. Supp. 427 (D.R.I. 1990). These issues do not relate to the ability of ETNG to obtain possession of the property, but instead question the appropriateness and breadth of the FERC

Certificate or the amount of compensation. The claims falling in the former category, such as complaints about the location of easement, the timing of blasting, or the placement of erosion controls, are solely the province of FERC, and should have been brought before the Commission during the notice and comment hearings. Any provisions which are unique to a particular parcel of property will be dealt with in the order for immediate possession. The complaints dealing with compensation should be reserved until the court-appointed Compensation Commission begins its investigation.

Once FERC made its order, the only power this court has is to ensure it is properly enforced. As shown above, the order itself is as comprehensive as it is final. This court has neither the desire nor the ability to rule on the necessity of the Certificate or the appropriateness of the orders. *See* 15 U.S.C. § 717r(b) (limiting review of FERC order to circuit courts of appeal). By granting the Certificate, FERC has

> found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity ...

15 U.S.C. § 717f(e). Due to the exhaustive nature of the FERC certification process, the jurisdiction of this court is limited to enforcing the order as written. This court cannot alter FERC's order, it can only allow or deny enforcement. Any

complaints concerning the means and timing as laid out in the Certificate must therefore be denied.

E. Constitutional violations

The landowners of one parcel argue that ETNG should not petition this court for a remedy based on "the failure of the Natural Gas Act," but should instead lobby Congress. They quote the Takings Clause of the Fifth Amendment and *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) for the proposition that "in situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of the post-deprivation remedy to compensate for the taking."

These defendants also make a Due Process argument that before a post-deprivation remedy satisfies due process, the following conditions must be met: (1) that the deprivation is unpredictable; (2) that pre-deprivation process is impossible; and (3) that the state actor's conduct is unauthorized. Memo. at 3 (quoting *Charbonnet v. Lee*, 951 F.2d 638, 642 (5th Cir. 1992). They contend that since the NGA process is predictable, pre-deprivation process is possible, and since ETNG's conduct is authorized under the NGA, then immediate possession is improper. Their arguments rely on a lack of process, yet I have held hearings on this issue. The only assumption that can be made is that the defendants here are really making an argument that possession is improper *before* compensation is awarded.

The U.S. Supreme Court recently reaffirmed the government's ability to condemn private land in *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (March 26, 2003), by stating: "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation'

must be paid to the owner" Taking property is in itself not unconstitutional until compensation is denied. *Shooting Point, L.L.C. v. Cumming*, 238 F. Supp. 2d 729 (E.D. Va. 2002). Therefore, "a takings claim becomes ripe only after a property owner has availed himself of all available state procedures and has been denied." *Id.* There is no Fifth Amendment requirement that the compensation be paid before or contemporaneous to the taking, just as long as the payment is reasonable, certain, and adequate. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking."); *Cosme Rosado v. Serrano Rodriguez*, 96 F. Supp. 2d 117, 122 (D.P.R. 2002); *Johnson v. U.S.*, 208 F.R.D. 148, 155 (W.D. Tex. 2001); *US West Communications, Inc. v. Minnesota Public Utilities Corn'n* , 55 F. Supp. 2d 968, 989 (D. Minn. 1999). All that is required to satisfy due process concerns here is that there be some sort of pre-deprivation hearing. *Cosme Rosado 96* F. Supp. 2d at 122.

All of the requirements for a constitutional taking have been met in this case. The defendants have received ample process, such as the hearing incident to this motion, and the bond posted by the plaintiffs provides assurance that compensation will be paid once the Commission has had time to properly consider the issue. I find, then, that the defendants constitutional rights have been adequately protected.

III. Conclusion

It appears that the plaintiff has finally reached as stage where it can begin to implement the powers granted by FERC. As the defendants have been unable to provide any sound reason why I should not enforce the plaintiff's FERC Certificate, I find that ENTG has established its right to exercise eminent domain over the defendants' property as outlined in the Certificate. The plaintiff's motion for

immediate possession will be GRANTED and an appropriate order entered.

/s/ Jackson L. Kiser
Senior United States District Judge

United States Court of Appeals,
Fourth Circuit.

EAST TENNESSEE NATURAL GAS COMPANY, Plaintiff-Appellee,
v.
John F. SAGE; Linda K. Sage, Defendants-Appellants, (CA-02-107-4)
and
1.20 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Margaret Clanton, Defendant-Appellant, CA-02-114-4
and
.28 Acres In Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Scott A. Fontaine; Lillie M. Fontaine, Defendants-Appellants, CA-02-120-4
and
2.09 Acres In Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Alva Holland, Defendant-Appellant, CA-02-123-4
and
.54 Acres In Henry County, Virginia; Janet M. Holland; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,

Plaintiff-Appellee,
v.
Maynard R. Joyce, Defendant-Appellant,
CA-02-125-4
and
2.26 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ervin L. Frazier, Jr., Defendant-Appellant,
CA-02-126-4
and
1.02 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Barbara G. Vass; Dossie G.V. Hall, a/k/a Dossie Shockley Vass, Defendants-Appellants, CA-02-128-4
and
1.59 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Layton Russell Hancock; John Wendell Hancock; Sonia Lucille Easter; Una Faye Saunders; Wayne Dwight Hancock; Heirs Of Royal Early Hancock, Defendants-Appellants,
and
2.57 Acres In Carroll County, Virginia; John Doe, et al.; Unknown Owners;
Josephine H. Powers; Rudolph Hancock; Alene Sumner; James F. Hancock;

Talford Clay Hancock; Thomas Kenneth Hancock;
Averette Early Hancock; Jane
A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
H. Wade Baker; Lola W. Baker,
Defendants-Appellants, (CA-02-132-4)
and
1.91 Acres In Carroll County, Virginia; John Doe,
et al.; Unknown Owners;
Jane A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Gregory L. Seibert, Defendant-Appellant,
(CA-02-133-4)
and
.45 Acres In Carroll County, Virginia; Jane A.
Harrison; John Doe, et al.;
Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robin Marie Seibert; Gregory L. Seibert,
Defendants-Appellants, (CA-02-134-4)
and
.61 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Helen E. Melton; Charlotte A. Edwards,
Defendants-Appellants, (CA-02-135-4)
and
Jane A. Harrison, County Assessor; John Doe, et
al.; Unknown Owners; 4.76
Acres In Carroll County, Virginia, Defendants.
East Tennessee Natural Gas Company,

Plaintiff-Appellee,
v.
Ralph D. Howell; Mabel Fulcher,
Defendants-Appellants, (CA-02-138-4)
and
Rose C. Howell; John Doe, et al.; C. Jerry Love,
Commissioner of Revenue;
Unknown Owners; 3.18 Acres In Patrick County,
Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Melvin A. Thomas, Defendant-Appellant,
(CA-02-140-4)
and
1.40 Acres In Patrick County, Virginia; John Doe,
et al.; C. Jerry Love,
Commissioner of Revenue; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
John M. Lewis; Comelia A. Lewis,
Defendants-Appellants, (CA-02-142-4)
and
C. Jerry Love, Commissioner of Revenue; John
Doe, et al.; Unknown Owners; .
37 Acres In Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Earl R. Potter; Joan A. Potter,
Defendants-Appellants, (CA-02-145-4)
and
C. Jerry Love, Commissioner of Revenue; John
Doe, et al.; Unknown Owners; .
60 Acres In Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

Jerry S. Thomas; Betty B. Thomas,
Defendants-Appellants, (CA-02-146-4)
and
3.04 Acres In Patrick County, Virginia; John Doe,
et al.; Unknown Owners; C.
Jerry Love, Commissioner of Revenue, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Nancy U. Stanley, Defendant-Appellant,
(CA-02-150-4)
and
3.62 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Otra Martin; Edna Lou Martin Smart; Ellen M.
Fulcher; Harvey Glenn Fulcher,
Defendants-Appellants, (CA-02-153-4)
and
3.81 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robert E. Meadows; Marion C. Meadows,
Defendants-Appellants, (CA-02-155-4)
and
.94 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

William Troy Strickland; Susan M. Strickland,
Defendants-Appellants, (CA-02-
160-4)
and
1.13 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
James A. Keesee; Joanne Richmond Keesee,
Defendants-Appellants, (CA-02-168-4)
and
1.58 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Thomas C. Williams, Jr.; Jeannie B. Williams,
Defendants-Appellants, (CA-02-
185-4)
and
3.27 Acres In Wythe County, Virginia; Mary
Casel, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Anissa J. Brady, a/k/a Anissa Holland,
Defendant-Appellant, (CA-02-197-4)
and
.65 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

Charles K. Webb; Lena Webb,
Defendants-Appellants, (CA-02-198-4)
and
.64 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Calvin Hugh Webb; Linvol Oscar Webb; Wendell
Wayne Webb, Defendants-
Appellants, (CA-02-202-4)
and
3.38 Acres In Carroll County, Virginia; John Doe,
et al.; Jane A. Harrison,
County Assessor; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Alva Jackson Horton; Heath Webb,
Defendants-Appellants, (CA-02-203-4)
and
1.60 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
George Lewis Webb; Edward Paul Webb; Roger
Lee Webb; Joel Ray Webb,
Defendants-Appellants, (CA-02-208-4)
and
.30 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Dorothea W. Bryant, Defendant-Appellant,
(CA-02-211-4)

and

1.23 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Clyde Holland; Shirley Holland,
Defendants-Appellants, (CA-02-212-4)
and
5.2 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
L.J. Rector; Charis Jean Rector; Johnny J. Rector; Joe Rector, Defendants-
Appellants, (CA-02-216-4)
and
3.98 Acres In Smyth County, Virginia; Richard Walker, Commissioner of
Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Fred Tolley; Guida Tolley, Defendants-Appellants, (CA-02-218-4)
and
4.0 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
James Fogelsong; Glen Stuart Fogelsong,
Defendants-Appellants, (CA-02-221-4)

and
2.64 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Weaver Enterprises, Incorporated,
Defendant-Appellant, (CA-02-182-4)
and
11.42 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff -Appellee,
v.
Ronnie Lynn Goforth; Susan D. Goforth; 3.51 Acres/Wythe County, (CA-02-215-4)
Defendants-Appellants,
and
Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners,
Defendants.

Nos. 03-1708 through 03-1741; 03-1797

Filed: May 14, 2004.
[ENTERED: May 14, 2004]

On Petition for Rehearing and Rehearing En Banc

Appellants filed petitions for rehearing and rehearing en banc.

The Panel voted to deny rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judge Widener voted to rehear the case en banc, and Judges

Niemeyer, Luttig, Michael, Motz, Traxler, Gregory, Shedd and Duncan voted against rehearing en banc. Chief Judge Wilkins and Judges Wilkinson, Williams and King are disqualified.

The Court denies the petition for rehearing and rehearing en banc. Entered at the direction of Judge Michael for the Court.

U.S. Const. Art. I § 1

Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

10 U.S.C.A. § 2538

§ 2538. Industrial mobilization: orders; priorities; possession of manufacturing plants; violations

(a) Ordering authority.--In time of war or when war is imminent, the President, through the head of any department, may order from any person or organized manufacturing industry necessary products or materials of the type usually produced or capable of being produced by that person or industry.

(b) Compliance with order required.--A person or industry with whom an order is placed under subsection (a), or the responsible head thereof, shall comply with that order and give it precedence over all orders not placed under that subsection.

(c) Seizure of manufacturing plants upon noncompliance.--In time of war or when war is imminent, the President, through the head of any department, may take immediate possession of any plant that is equipped to manufacture, or that in the opinion of the head of that department is capable of being readily transformed into a plant for manufacturing, arms or ammunition, parts thereof, or necessary supplies for the armed forces if the person or industry owning or operating the plant, or the responsible head thereof, refuses--

(1) to give precedence to the order as prescribed in subsection (b);

(2) to manufacture the kind, quantity, or quality of arms or ammunition, parts thereof, or necessary supplies, as ordered by the head of such department; or

(3) to furnish them at a reasonable price as determined by the head of such department.

(d) **Use of seized plant.**--The President, through the head of any department, may manufacture products that are needed in time of war or when war is imminent, in any plant that is seized under subsection (c).

(e) **Compensation required.**--Each person or industry from whom products or materials are ordered under subsection (a) is entitled to fair and just compensation. Each person or industry whose plant is seized under subsection (c) is entitled to a fair and just rental.

(f) **Criminal penalty.**--Whoever fails to comply with this section shall be imprisoned for not more than three years and fined under title 18.

10 U.S.C.A. § 2663

§ 2663. Acquisition

(a) The Secretary of a military department may have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land, including temporary use, needed for--

(1) the site, construction, or operation of fortifications, coast defenses, or military training camps;

(2) the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives or other munitions of war; or

(3) the development and transmission of power for the operation of plants under clause (2).

(b) In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired.

(c) The Secretary of the military department concerned may contract for or buy any interest in land, including temporary use, needed for any purpose named in subsection (a), as soon as the owner fixes a price for it and the Secretary considers that price to be reasonable.

(d) The Secretary of the military department concerned may accept for the United States a gift of any interest in land, including temporary use, for any purpose named in subsection (a).

15 U.S.C.A. § 717f

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is

unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of

emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

> **(A)** natural gas sold by the producer to such person; and
>
> **(B)** natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform

to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant

certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

16 U.S.C.A. § 425a

§ 425a. Acquisition of lands

The Secretary of the Interior is authorized to cause condemnation proceedings to be instituted in the name of the United States under the provisions of section 3113 of Title 40, to acquire title to the lands, interests therein, or rights pertaining thereto within the said Fredericksburg and Spotsylvania County Battle Fields Memorial, authorized to be acquired in section 425 of this title, and the United States shall be entitled to immediate possession upon the filing of the petition in condemnation in the United States District Court for the Eastern District of Virginia: *Provided,* That when the owner of such lands, interests therein, or rights pertaining thereto shall fix a price for the same, which in the opinion of the commission, referred to in section 425c of this title, and the Secretary of the Interior, shall be reasonable, the Secretary may purchase the same without further delay: *Provided further,* That the Secretary of the Interior is authorized to accept on behalf of the United States, donations of lands, interests therein or rights pertaining thereto required for the said Fredericksburg and Spotsylvania County Battle Fields Memorial: *And provided further,* That no public money shall be expended for title to any lands until a written opinion of the Attorney General shall be had in favor of the validity of title thereto.

16 U.S.C.A. § 430k

§ 430k. Condemnation proceedings; purchase without condemnation; acceptance of donations of land

The Secretary of the Interior is authorized to cause condemnation proceedings to be instituted in the name of the United States under the provisions of section 3113 of Title 40, to acquire title to the lands, interests therein, or rights pertaining thereto within the said battlefield, and the United States shall be entitled to immediate possession upon the filing of the petition in condemnation in the United States District Court for the District of Maryland: *Provided,* That when the owner of such lands, interests therein, or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of the Interior, shall be reasonable, the Secretary may purchase the same without further delay: *Provided further,* That the Secretary of the Interior is authorized to accept, on behalf of the United States, donations of lands, interests therein, or rights pertaining thereto required for the battlefield: *And provided further,* That title and evidence of title to lands and interests therein acquired for said battlefield shall be satisfactory to the Secretary of the Interior.

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

33 U.S.C.A. § 594

§ 594. *When* immediate possession of land may be taken

Whenever the Secretary of the Army, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights-of-way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided,* That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid.

40 U.S.C. § 3113

§ 3113. Acquisition by condemnation.

An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so. The Attorney General, on application of the officer, shall have condemnation proceedings begun within 30 days from receipt of the application at the Department of Justice.

40 U.S.C.A. § 3114

§ 3114. Declaration of taking

(a) Filing and content.--In any proceeding in any court of the United States outside of the District of Columbia brought by and in the name of the United States and under the authority of the Federal Government to acquire land, or an easement or right of way in land, for the public use, the petitioner may file, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the land described in the petition, declaring that the land is taken for the use of the Government. The declaration of taking shall contain or have annexed to it--

(1) a statement of the authority under which, and the public use for which, the land is taken;

(2) a description of the land taken that is sufficient to identify the land;

(3) statement of the estate or interest in the land taken for public use;

(4) a plan showing the land taken; and

(5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.

(b) Vesting of title.--On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration--

(1) title to the estate or interest specified in the declaration vests in the Government;

(2) the land is condemned and taken for the use of the Government; and

(3) the right to just compensation for the land vests in the persons entitled to the compensation.

(c) **Compensation.**--

(1) **Determination and award.**--Compensation shall be determined and awarded in the proceeding and established by judgment. The judgment shall include interest, in accordance with section 3116 of this title, on the amount finally awarded as the value of the property as of the date of taking and shall be awarded from that date to the date of payment. Interest shall not be allowed on as much of the compensation as has been paid into the court. Amounts paid into the court shall not be charged with commissions or poundage.

(2) **Order to pay.**--On application of the parties in interest, the court may order that any part of the money deposited in the court be paid immediately for or on account of the compensation to be awarded in the proceeding.

(3) **Deficiency judgment.**--If the compensation finally awarded is more than the amount of money received by any person entitled to compensation, the court shall enter judgment against the Government for the amount of the deficiency.

(d) **Authority of court.**--On the filing of a declaration of taking, the court--

(1) may fix the time within which, and the terms on which, the parties in possession shall be required to surrender possession to the petitioner; and

(2) may make just and equitable orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges.

(e) **Vesting not prevented or delayed.**--An appeal or a bond or undertaking given in a proceeding does not prevent or delay the vesting of title to land in the Government.

40 U.S.C.A. § 3118

§ 3118. Right of taking as addition to existing rights

The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 3114 of this title is in addition to any right, power, or authority conferred by the laws of the United States or of a State, territory, or possession of the United States under which the proceeding may be conducted, and does not abrogate, limit, or modify that right, power, or authority.

42 U.S.C.A. § 5196

§ 5196. Detailed functions of administration

(a) In general

In order to carry out the policy described in section 5195 of this title, the Director shall have the authorities provided in this section.

(b) Federal emergency response plans and programs

The Director may prepare Federal response plans and programs for the emergency preparedness of the United States and sponsor and direct such plans and programs. To prepare such plans and programs and coordinate such plans and programs with State efforts, the Director may request such reports on State plans and operations for emergency preparedness as may be necessary to keep the President, Congress, and the States advised of the status of emergency preparedness in the United States.

(c) Delegation of emergency preparedness responsibilities

With the approval of the President, the Director may delegate to other departments and agencies of the Federal Government appropriate emergency preparedness responsibilities and review and coordinate the emergency preparedness activities of the departments and agencies with each other and with the activities of the States and neighboring countries.

(d) Communications and warnings

The Director may make appropriate provision for necessary emergency preparedness communications and for

dissemination of warnings to the civilian population of a hazard.

(e) Emergency preparedness measures

The Director may study and develop emergency preparedness measures designed to afford adequate protection of life and property, including--

(1) research and studies as to the best methods of treating the effects of hazards;

(2) developing shelter designs and materials for protective covering or construction; and

(3) developing equipment or facilities and effecting the standardization thereof to meet emergency preparedness requirements.

(f) Training programs

(1) The Director may--

(A) conduct or arrange, by contract or otherwise, for training programs for the instruction of emergency preparedness officials and other persons in the organization, operation, and techniques of emergency preparedness;

(B) conduct or operate schools or including the payment of travel expenses, in accordance with subchapter I of chapter 57 of Title 5, and the Standardized Government Travel Regulations, and per diem allowances, in lieu of subsistence for trainees in attendance or the furnishing of subsistence and quarters for trainees and instructors on terms prescribed by the Director; and

(C) provide instructors and training aids as necessary.

(2) The terms prescribed by the Director for the payment of travel expenses and per diem allowances authorized by this subsection shall include a provision that such payment shall not exceed one-half of the total cost of such expenses.

(3) The Director may lease real property required for the purpose of carrying out this subsection, but may not acquire fee title to property unless specifically authorized by law.

(g) Public dissemination of emergency preparedness information

The Director may publicly disseminate appropriate emergency preparedness information by all appropriate means.

(h) Interstate emergency preparedness compacts

(1) The Director may--

(A) assist and encourage the States to negotiate and enter into interstate emergency preparedness compacts;

(B) review the terms and conditions of such proposed compacts in order to assist, to the extent feasible, in obtaining uniformity between such compacts and consistency with Federal emergency response plans and programs;

(C) assist and coordinate the activities under such compacts; and

(D) aid and assist in encouraging reciprocal emergency preparedness legislation by the States which will permit the furnishing of mutual aid for emergency preparedness purposes in the event of a hazard which cannot be adequately met or controlled by a State or political subdivision thereof threatened with or experiencing a hazard.

(2) A copy of each interstate emergency preparedness compact shall be transmitted promptly to the Senate and the House of Representatives. The consent of Congress is deemed to be granted to each such compact upon the expiration of the 60-day period beginning on the date on which the compact is transmitted to Congress.

(3) Nothing in this subsection shall be construed as preventing Congress from disapproving, or withdrawing at any time its consent to, any interstate emergency preparedness compact.

(i) Materials and facilities

(1) The Director may procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency preparedness, with the right to take immediate possession thereof.

(2) Facilities acquired by purchase, donation, or other means of transfer may be occupied, used, and improved for the purposes of this subchapter before the approval of title by the Attorney General as required by sections 3111

(3) The Director may lease real property required for the purpose of carrying out the

provisions of this subsection, but shall not acquire fee title to property unless specifically authorized by law.

(4) The Director may procure and maintain under this subsection radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices and distribute such devices by loan or grant to the States for emergency preparedness purposes, under such terms and conditions as the Director shall prescribe.

(j) Financial contributions

(1) The Director may make financial contributions, on the basis of programs or projects approved by the Director, to the States for emergency preparedness purposes, including the procurement, construction, leasing, or renovating of materials and facilities. Such contributions shall be made on such terms or conditions as the Director shall prescribe, including the method of purchase, the quantity, quality, or specifications of the materials or facilities, and such other factors or care or treatment to assure the uniformity, availability, and good condition of such materials or facilities.

(2) No contribution may be made under this subsection for the procurement of land or for the purchase of personal equipment for State or local emergency preparedness workers.

(3) The amounts authorized to be contributed by the Director to each State for organizational equipment shall be equally matched by such State from any source it determines is consistent with its laws.

(4) Financial contributions to the States for shelters and other protective facilities shall be determined by taking the

amount of funds appropriated or available to the Director for such facilities in each fiscal year and apportioning such funds among the States in the ratio which the urban population of the critical target areas (as determined by the Director) in each State, at the time of the determination, bears to the total urban population of the critical target areas of all of the States.

(5) The amounts authorized to be contributed by the Director to each State for such shelters and protective facilities shall be equally matched by such State from any source it determines is consistent with its laws and, if not matched within a reasonable time, the Director may reallocate such amounts to other States under the formula described in paragraph (4). The value of any land contributed by any State or political subdivision thereof shall be excluded from the computation of the State share under this subsection.

(6) The amounts paid to any State under this subsection shall be expended solely in carrying out the purposes set forth herein and in accordance with State emergency preparedness programs or projects approved by the Director. The Director shall make no contribution toward the cost of any program or project for the procurement, construction, or leasing of any facility which (A) is intended for use, in whole or in part, for any purpose other than emergency preparedness, and (B) is of such kind that upon completion it will, in the judgment of the Director, be capable of producing sufficient revenue to provide reasonable assurance of the retirement or repayment of such cost; except that (subject to the preceding provisions of this subsection) the Director may make a contribution to any State toward that portion of the cost of the construction, reconstruction, or enlargement of any facility which the Director determines to be directly attributable to the incorporation in such facility of any feature of construction

or design not necessary for the principal intended purpose thereof but which is, in the judgment of the Director necessary for the use of such facility for emergency preparedness purposes.

(7) The Director shall submit to Congress a report, at least annually, regarding all contributions made pursuant to this subsection.

(8) All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of any contribution of Federal funds made by the Director under this subsection shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 to 3144, 3146, 3147 of Title 40, and every such employee shall receive compensation at a rate not less than one and 112 times the basic rate of pay of the employee for all hours worked in any workweek in excess of eight hours in any workday or 40 hours in the workweek, as the case may be. The Director shall make no contribution of Federal funds without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (5 U.S.C. App.) and section 3145 of Title 40.

(k) Sale or disposal of certain materials and facilities

The Director may arrange for the sale or disposal of materials and facilities found by the Director to be unnecessary or unsuitable for emergency preparedness purposes in the same manner as provided for excess property under the Federal Property and Administrative Services Act of 1949. Any funds received as proceeds from

the sale or other disposition of such materials and facilities shall be deposited into the Treasury as miscellaneous receipts.

50 U.S.C.A. § 82

§ 82. Procurement of ships and material during war

(a) Definitions

The word "person" as used in subsections (b) and (c) of this section shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) Presidential powers

In time of war the President is authorized and empowered, in addition to all other existing provisions of law:

> **First.** Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person

owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

(d) [FN1] Compensation for commandeered material

Whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of subsection (b) of this section, it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section 1346 or 1491 of Title 28.

[FN1] So in original. Section enacted without a subsec. (c).

50 App. U.S.C.A. § 468

§ 468. Utilization of industry

(a) Placement of orders; Congressional action; notification of committees of certain proposed payment orders, resolution of disapproval, continuity of session, computation of period; "small business" defined

Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate, except that no order which requires payments thereunder in excess of $25,000,000 shall be placed with any person, unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed order and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order. For purposes of the preceding sentence, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period. Any person with whom an order is placed pursuant to the

provisions of this section shall be advised that such order is placed pursuant to the provisions of this section. Under any such program of national procurement, the President shall recognize the valid claim of American shall business to participate in such contracts, in such manufactures, and in such distribution of materials, and small business shall be granted a fair share of the orders placed, exclusively for the use of the armed forces or for other Federal agencies now or hereafter designated in this section. For the purposes of this section, a business enterprise shall be determined to be "small business" if (1) its position in the trade or industry of which it is a part is not dominant, (2) the number of its employees does not exceed 500, and (3) it is independently owned and operated.

(b) Precedence of Government placed orders

It shall be the duty of any person with whom an order is placed pursuant to the provisions of subsection (a) of this section, (1) to give such order such precedence with respect to all other orders (Government or private) theretofore or thereafter placed with such person as the President may prescribe, and (2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible.

(c) Failure to give precedence; Government possession

In case any person with whom an order is placed pursuant to the provisions of subsection (a) of this section refuses or fails--

> (1) to give such order such precedence with respect to all other orders (Government or private) theretofore or thereafter placed with such person as the President may have prescribed;

(2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible as determined by the President;

(3) to produce the kind or quality of articles or materials ordered; or

(4) to furnish the quantity, kind, and quality of articles or materials ordered at such price as shall be negotiated between such person and the Government agency concerned; or in the event of failure to negotiate a price, to furnish the quantity, kind, and quality of articles or materials ordered at such price as he may subsequently be determined to be entitled to receive under subsection (d) of this section;

the President is authorized to take immediate possession of any plant, mine, or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government.

(d) Payment of compensation by United States

Fair and just compensation shall be paid by the United States (1) for any articles or materials furnished pursuant to an order placed under subsection (a) of this section, or (2) as rental for any plant, mine, or other facility of which possession is taken under subsection (c) of this section.

(e) Application of Federal and State laws governing employees

Nothing contained in this section shall be deemed to render inapplicable to any plant, mine, or facility of which possession is taken pursuant to subsection (c) of this section

any State or Federal laws concerning the health, safety, security, or employment standards of employees.

(f) Penalties

Any person, or any officer of any person as defined in this section, who willfully fails or refuses to carry out any duty imposed upon him by subsection (b) of this section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than three years, or by a fine of not more than $50,000, or by both such imprisonment and fine.

(g) "Person" and "Government agency" defined

(1) As used in this section--

(A) The term "person" means any individual, firm, company, association, corporation, or other form of business organization.

(B) The term "Government agency" means any department, agency, independent establishment, or corporation in the Executive branch of the United States Government.

(2) For the purposes of this section, a plant, mine, or other facility shall be deemed capable of producing any articles or materials if it is then producing or furnishing such articles or materials or if the President after consultation with and receiving advice from the National Security Resources Board determines that it can be readily converted to the production or furnishing of such articles or materials.

(h) Rules and regulations governing steel industry; mandatory

The President is empowered, through the Secretary of Defense, to require all producers of steel in the United States to make available, to individuals, firms, associations, companies, corporations, or organized manufacturing industries having orders for steel products or steel materials required by the armed forces, such percentages of the steel production of such producers, in equal proportion deemed necessary for the expeditious execution of orders for such products or materials. Compliance with such requirement shall be obligatory on all such producers of steel and such requirement shall take precedence over all orders and contracts theretofore placed with such producers. If any such producer of steel or the responsible head or heads thereof refuses to comply with such requirement, the President, through the Secretary of Defense, is authorized to take immediate possession of the plant or plants of such producer and, through the appropriate branch, bureau, or department of the armed forces, to insure compliance with such requirement. Any such producer of steel or the responsible head or heads thereof refusing to comply with such requirement shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

Federal Rules of Civil Procedure Rule 65

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is

irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance;

shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.

Federal Rules of Civil Procedure Rule 71A

Rule 71A. Condemnation of Property

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest

in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) **Filing.** In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) **Process.**

(1) **Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) **Same; Form.** Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be

taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) **Service of Notice.**

(A) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) Service by Publication. Upon the filing of a certificate of the plaintiffs attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if

there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners." Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and

defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) **Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the

practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.

(i) **Dismissal of Action.**

(1) As of Right. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) **Deposit and its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(k) **Condemnation Under a State's Power of Eminent Domain.** The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(i) **Costs.** Costs are not subject to Rule 54(d).

(3) (2)

Nos. 04-174 & 04-221

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

-and-

RONNIE LYNN GOFORTH, SUSAN D. GOFORTH, and WEAVER ENTERPRISES, INC.,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners present only one question for review, although they have stated it two different ways. Respondent East Tennessee Natural Gas Company ("ETNG") believes that the issue is more properly stated as follows:

Consistent with courts across the country, and as authorized by Fed. R. Civ. P. 65 and 71A, did the district court properly issue a preliminary injunction granting ETNG possession of easements for the construction and operation of an underground natural gas pipeline on Petitioners' properties after first determining that ETNG had a substantive right to condemn the easements?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, East Tennessee Natural Gas, LLC f/k/a East Tennessee Natural Gas Company has the following parent corporations:

ETNG is an indirect wholly owned subsidiary corporation of Duke Energy Corporation that is publicly traded.

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Bell v. Hood, 327 U.S. 678 (1946) 8

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Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 8, 9

Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F. Supp. 2d 976 (N.D. Ill. 2002) 6, 12

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 8, 9

Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276 (D. Kan. 1999) 13

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JURISDICTION

This Court does not have jurisdiction over the matter of *Ronnie Lynn Goforth and Susan D. Goforth v. East Tennessee Natural Gas Company*. Although the docket record indicates to the contrary, the Goforths' case was not consolidated with any other cases before the Fourth Circuit. The Goforths failed to file a petition for rehearing or rehearing *en banc* in the Fourth Circuit. Thus, the time to file a petition for a writ of certiorari in this Court expired prior to the filing of this Petition. Sup. Ct. Rule 13(3). The time limit to file a petition for writ of certiorari is mandatory and jurisdictional. *See Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994).

The Goforths attempt to circumvent this error by filing a joint petition for a writ of certiorari with Petitioner Weaver Enterprises. Unlike the Goforths, Weaver Enterprises filed a petition for rehearing or rehearing *en banc* in the Fourth Circuit and its Petition to this Court is timely.

STATEMENT OF THE CASE

Following a 16-month review process, the Federal Energy Regulatory Commission ("FERC") issued ETNG a certificate of public convenience and necessity to construct an interstate natural gas pipeline known as the Patriot Project to serve the natural gas needs of portions of Tennessee, Virginia, and North Carolina. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 12a-13a.[1] FERC required ETNG

1. This Response is filed in response to two separate petitions. The Petitioners in *Joyce, et al. v. East Tennessee Natural Gas Co.*, 04-0174 will be referred to herein as "Joyce Petitioners." The (Cont'd)

to complete the Patriot Project by January 1, 2005. Upon issuance of the certificate of public convenience and necessity, pursuant to the Natural Gas Act, ETNG became vested with the power of eminent domain over any lands needed for the project. 15 U.S.C. § 717f(h).

ETNG's attempts to amicably acquire easements from affected landowners were largely successful. Of the more than 1300 landowners affected by the Patriot Project, in excess of ninety percent of the landowners reached agreement with ETNG without the necessity of litigation. Pet. App. at 14a. To acquire easements in the remaining parcels, ETNG filed 133 condemnation actions, naming as defendants those landowners with whom it had been unable to reach agreement, including Petitioners. Consistent with the certificate of public convenience and necessity, ETNG sought to condemn temporary (two-year) and permanent easements, each generally no wider than 50 feet. Along with the complaint in each case, ETNG filed motions requesting that the district court use its inherent equitable power to grant it immediate possession of the easements requested. ETNG pleaded that it was without an adequate legal remedy and it would suffer great delay and expense if not allowed possession prior to a determination of just compensation.

ETNG also deposited funds with the district court for the temporary and permanent easement interests in each parcel of land in amounts estimated to be just compensation for the individual tracts affected. The defendant landowners

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(Cont'd)

Petitioners in *Goforth, et al. v. East Tennessee Nat. Gas Co.*, 04-0221 will be referred to herein as "Weaver Petitioners." Both groups of Petitioners will be referred to collectively as "Petitioners." References to the Appendix will be to the Joyce appendix.

are allowed to immediately draw down the money ETNG deposited. Pet. App. at 32a, 42a. After the condemnation actions were filed, ETNG reached settlements with additional landowners.

On March 4, 2003, following an initial hearing on the matter, the district court bifurcated the cases. Pet. App. at 49a. In phase one, the district court would consider ETNG's right to condemn. In phase two, pursuant to Fed. R. Civ. P. 71A, a commission would determine compensation due the defendant landowners. Pet. App. at 49a. On May 8, 2003, after a second hearing on the matter, the district court entered an order and memorandum opinion finding that ETNG "has established its right to exercise eminent domain over the defendants' property" and granting ETNG's motion for possession contingent on ETNG meeting other requirements set forth in that order. Pet. App. at 63a. On June 6, 2003, the district court entered a supplemental memorandum opinion addressing Petitioners' arguments against ETNG's immediate possession of the property. Pet. App. at 38a-42a. The district court held that "Congress entrusted the issue of immediate possession to the equitable powers of the Court." *Id* at 39a. The district court further considered each of the four requirements for injunctive relief and found them satisfied. Pet. App. at 40a-42a.

Petitioners thereafter conceded that the district court properly determined that ETNG has the right to condemn their property for a natural gas pipeline that is necessary to serve the public needs of citizens in North Carolina, Virginia and Tennessee. Pet. App. at 15a.

On March 22, 2004, the Fourth Circuit issued its opinion affirming the district court's injunction order. Pet. App. at

1a-35a.[2] The Fourth Circuit held that the district court's injunction order was consistent with the U.S. Constitution, established principals of equity, the Natural Gas Act, the Federal Rules of Civil Procedure, and was not an abuse of discretion. Pet. App. at 29a. The Fourth Circuit noted that "the need for natural gas in a region with little or no service — made it especially appropriate for the district court to consider equitable relief that would allow expeditious construction of the pipeline." *Id.* Petitioners' requests for rehearing and for rehearing *en banc* (other than the putative Goforth petitioners) were denied. Pet. App. at 65a-74a.

Construction of the Patriot Project has been completed and natural gas is flowing through the pipeline. ETNG may not now abandon or terminate its operation of the pipeline and the provision of natural gas provided by the Patriot Project without a FERC order under 15 U.S.C. § 717f(b). If the district court had not exercised its inherent equitable power, the pipeline would not have been completed by the date FERC required and citizens of several states would be without the necessary energy the pipeline now provides.

REASONS FOR DENYING THE PETITION

The Court should deny the Petitions. First, the Fourth Circuit's well-reasoned decision does not conflict with the decision of any other Circuit. Unremarkably, the Fourth Circuit affirmed the use of a remedy often used to facilitate the construction of linear pipeline projects necessitated by our growing energy needs. Long-standing precedents allow

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2. The Fourth Circuit's opinion is reported at 361 F.3d 803 (4th Cir. 2004). References to the opinion will refer to the Joyce Petitioners' appendix instead of the reported decision.

immediate possession of condemned property prior to the payment of just compensation. The use of injunctive relief below does not raise important, new or unanswered questions of federal law.[3] Second, Petitioners' separation of powers argument is futile. The remedy employed below and by other federal courts flows from the specific grant of the power of eminent domain to natural gas companies and complies with Fed. R. Civ. P. 71A. Third, Petitioners' attempt to equate quick take powers with injunctive relief ignores the fundamental differences between the two remedies. Fourth, the courts below did not expand the use of injunctive relief. Fifth, contrary to the Weaver Enterprises Petitioners' argument, landowners are entitled to just compensation, not to profit at the public's expense.

Simply put, Petitioners articulate no compelling reason for review by this Court. Sup. Ct. R. 10.[4]

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3. Petitioners challenge only whether injunctive relief is available. They implicitly concede that if it is available, they have no complaint about its use here.

4. The Joyce Petitioners' complaint that the district court erred by ordering the United States Marshal's Service to aid in the enforcement of the court's possession order if necessary (Joyce Pet. at i, 3, 30), was never raised below. Even if the Court were inclined to reach this never-before raised argument, it is unsupported by any authority. Moreover, Petitioners Joyce's statement that "[t]he marshals, at the direction of ETNG, patrolled the landowner's property and has [sic] maintained a constant presence throughout the construction" (*id.* at 3) is inaccurate and unsupported in the record.

I. No Conflict Exists Between the Decisions of the Fourth Circuit and the Seventh Circuit.

The Fourth Circuit's decision does not conflict with *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998). In *Northern Border*, unlike the case *sub judice*, the pipeline company did not claim a substantive entitlement to the property and specifically disavowed such entitlement. *Id.* at 472. The Seventh Circuit held that absent a determination of a substantive entitlement to the property, the district court properly denied the request for an injunction. *Id.* As the Fourth Circuit pointed out, *Northern Border* is distinguishable because the company in that case had not obtained an order determining that it had the right to condemn before it sought injunctive relief. Pet. App. at 29a. Because ETNG did obtain such an order, unlike the company in *Northern Border*, its request for injunctive relief was "grounded in substantive law establishing a preexisting entitlement to the property." ETNG was thus justified in invoking the district court's equity jurisdiction. Pet. App. at 29a-30a ("once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction").

Subsequent to *Northern Border*, several district courts in the jurisdiction of the Seventh Circuit have addressed the Seventh Circuit's "substantive entitlement" requirement. In both *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002), (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)) and *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000) (distinguishing

Northern Border Pipeline Co. v. 86.72 Acres of Land and holding that an order of condemnation gives the pipeline company a "substantive entitlement" to immediate possession), the courts granted immediate possession after first entering orders confirming the plaintiffs' proper exercise of the power of eminent domain but before compensation was determined. That is precisely the procedure that the district court in the instant case followed.

As the Fourth Circuit stated, after first determining that ETNG had a substantive right to condemn the landowners' property, the district court could then properly consider whether to grant the condemnor's request for injunctive relief. Pet. App. at 29a-30a. The right to condemn flows from § 717f(h) and after an affirmative determination that the natural gas company has complied with its requirements the gas company has a substantive right to condemn.[5] This property interest is one "which a court of equity will enforce and protect." *See Seymour v. Freer*, 75 U.S. 202, 213-14 (1868).

In sum, the Fourth Circuit correctly reasoned that *Northern Border* does not support Petitioners' argument. Pet. App. at 28a-29a. There is no conflict between the Circuits. To the contrary, and as discussed below, a uniform and now substantial body of federal case law supports this equitable remedy.

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5. Petitioners challenged ETNG right to condemn the property before the district court. Each of their challenges to ETNG's right to take was considered and rejected by the district court. Pet. App. at 46a-64a. However, as stated above, this point was conceded on appeal. Pet. App. at 15a.

II. The District Court's Preliminary Injunction Order Granting ETNG Immediate Possession Does Not Violate the Separation of Powers Doctrine.

A. Congress did not expressly limit equitable relief in the Natural Gas Act.

Petitioners contend that a condemning authority may only seize property prior to paying just compensation when specifically authorized by Congress. Yet, they fail to cite a single case holding that the use of the injunction procedure to award possession before payment of just compensation is improper. Moreover, their argument is contrary to the well-settled tenet of statutory construction that a court will presume the availability of all remedies unless Congress has expressly provided to the contrary. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

This Court has held that it will not lightly assume that Congress has stripped courts of their equitable jurisdiction; rather a departure from equity requires a clear and valid legislative command. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The "power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." A statute's silence on a particular remedy "'is no more significant than the fact that it does not in terms authorize the execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (quoting, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). In *Franklin*, this Court held that a plaintiff had a private cause of action pursuant to 20 U.S.C. §§ 1681-88 (Title IX) even

though a private right of action is not expressly set out in the statute. 503 U.S. at 70-71. In addition, available remedies specifically include equitable remedies, even when they are not spelled out in the statute. *See Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (citations omitted) (affirming the district court's finding of equitable remedies for beneficiaries of individual Indian trust accounts against agencies that had mismanaged the trusts, even though the federal statutes protecting the Indian trust accounts did not specifically provide for equitable remedies). This Court has also emphasized that in cases involving the public interest as identified by statute, which this case involves, a court's equitable discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases." *Hecht*, 321 U.S. at 331. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 552 (1937) (citations omitted).

FERC determined that the construction of ETNG's pipeline was in the public interest and established an in-service date of January 1, 2005. Thus, the district court properly exercised its equitable authority and allowed ETNG to enter the properties to construct the pipeline.

The Joyce Petitioners' reliance on the Court's holding in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) to support their argument that immediate possession is a power of eminent domain vested in Congress that cannot be authorized by the judiciary without explicit grant from

Congress (Pet., *passim*) is misplaced. *Youngstown* involved a situation in which the President through executive order took temporary possession of steel mills to avoid a nationwide steelworkers strike. The President did not assert he was entitled to take permanent title to the steel mills or that he was operating under a statutory power of eminent domain. This Court held that the President did not have the authority to issue such an executive order. *Id* at 585. The Constitution did not give the President this authority and there was no act of Congress from which this power could fairly be implied. *Id.* at 585. Moreover, Congress had specifically considered and rejected an amendment to the Taft-Hartley Act that would have authorized seizure of property under certain circumstances to avoid a labor dispute. *Id.* at 586. In the case at hand, Congress specifically authorized the use of eminent domain by interstate natural gas companies upon receipt of a Certificate of Public Convenience and Necessity. 15 U.S.C. § 717f(h).

The Joyce Petitioners also cite to 26 Am. Jur. 2d Eminent Domain § 5 (1996) for the same proposition. Pet. at 7. However, even if authoritative, this section recognizes that while the exercise of the power of eminent domain is a legislative function "once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative. . . ." This section does not discuss "quick take," immediate possession or the procedure for permitting possession. *Id.*

Also unavailing is the Joyce Petitioners' reliance upon *Johnson v. Collins Entm't Co.*, 204 F.3d 573, 575 (4th Cir. 2000) in support of their position that the use of equitable power to grant the remedy of immediate possession under these circumstances constitutes impermissible judicial

activism. Pet. at 15. The *Johnson* case does not address the issue of eminent domain powers and deals with the issue of alleged federal judicial infringement over basic state regulatory functions. Interestingly, Petitioners deleted from their quotation of the Court's opinion the specific circumstances of the "judicial activism." The quotation properly reads "[i]nherent power wielded by life-tenured judges without authorization in statute *over the basic functions of a sovereign state* simply go too far." *Johnson* at 575 (emphasis supplied). Considered in its context, *Johnson* does not support Petitioner's argument.

B. The remedy approved by the Fourth Circuit and a myriad of other courts is consistent with the procedural framework of Rule 71A.

Rule 71A of the Federal Rules of Civil Procedure was adopted to provide uniformity to the various condemnation procedures and sets forth certain procedures specific to condemnation. *Kirby Forest Industries, Inc. v. United States*, 476 U.S. 1, 4 (1984).

The drafters of Rule 71A specifically contemplated the condemning authority taking possession prior to a hearing on just compensation. Specifically, Rule 71A provides:

> If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or *taken possession*, the plaintiff may dismiss the action as to that property, without an order of the court . . .

71A F. R. Civ. P. 71A(i)(l) (emphasis supplied).

Rule 71A also addresses the applicability of other rules of civil procedure in condemnation proceedings.

> The Rules of Civil Procedure for the United States District Courts govern the procedure for condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

F. R. Civ. P. 71A(a). The remaining sections of Rule 71A do not limit the use of Rule 65 in condemnation matters. Thus, Rule 65 remains a viable remedy in condemnation actions.

Likewise, as the Fourth Circuit held, Congress tacitly approved the Federal Rules of Civil Procedure, including Rules 65 and 71A: "Congress has never given any indication that it disapproves of [the use of the injunction procedure]" even in light of the extensive case law utilizing this procedure.[6] Pet. App. at 23a.

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6. *See, e.g., Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 acres of land*, 2003 U.S. Dist. Lexis 11163 (N.D. Ill. 2003); *Northwest Pipeline Corp. v. The 20'x 1,430' Pipeline Right of Way Easement*, 197 F. Supp. 2d 1241 (E.D. Wash. 2002); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002) (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)); *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001); *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *Tennessee Gas Pipeline v. New England Power, C.T.L., Inc.*, 6 F. Supp. 2d 102, 104 (D. Minn. 1998); *USG Pipeline Co. v. 1.74 Acres of Land in Marion County, Tennessee*, 1 F. Supp. 2d 816, 826 (E.D. Tenn. 1998); *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F. Supp. 1110, 1117 (D. Nev. 1990); *Northern Border Pipeline Co. v. 127.79 Acres*

(Cont'd)

In sum, Petitioners' separation of powers argument is makeweight and overlooks the substantial authority supporting the granting of injunctive relief to effect a substantive right granted by Congress.

III. The District Court Did Not Grant ETNG "Quick Take" Rights or Powers.

Below and in this Court, the Joyce Petitioners improperly equate the "quick take" remedy with the separate and distinct injunction remedy. Petitioners ask this Court to make the illogical leap that because Congress did not grant natural gas companies quick take power, Congress precluded district courts from using their equitable power to grant natural gas companies immediate possession. The primary fallacy in this argument is that the two remedies are fundamentally different.[7] "Quick take"

(Cont'd)

of Land, 520 F. Supp. 170 (D.N.D. 1981). Other courts have held that immediate possession is an available and appropriate remedy provided the condemning authority can make the appropriate showing of need. *Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000); *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999).

7. The Joyce Petitioners punctuate their brief with references to "these powers" or "such powers," lumping together the very different, virtually automatic, quick take power with the more stringent requirements for injunctive relief. The Joyce Petitioners also mischaracterize the Fourth Circuit's holding to advance their argument. The Fourth Circuit did not conclude that district courts are authorized by Rule 65 to grant quick take power in the form of injunctive relief. Pet. at 17, 18, 21. The Fourth Circuit instead held that "a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession." Pet. App. at 23a.

is the ***automatic vesting*** of title in the condemner after certain procedural steps have been taken. Pet. App. at 24a; 40 U.S.C. § 3114. For example, the Declaration of Taking Act authorizes the government to take possession of condemned land immediately upon the filing of a declaration that cites the authority for the taking, describes the public use and includes a deposit of funds with the court equal to the estimated just compensation due the landowner. 40 U.S.C. § 3114(a). The process involves minimal judicial oversight by the district court.

In contrast, granting a natural gas company immediate possession through an injunction is far from an automatic procedure. Courts that have used their equitable powers to grant immediate possession have done so only after a deliberate and careful analysis of the strict requirements for such relief. *E.g.*, Pet. App. at 40a-42a. In fact, one district court held the natural gas company failed to meet the requirements for equitable relief and denied its request. *See Nat'l Fuel Gas Supply Corp. v. 138 Acres*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (equitable relief "unwarranted" where the evidence conflicted on whether the company would be irreparably harmed absent issuance of an injunction). The New York district court's decision refutes the Weaver Enterprises' argument that an injunction is a "result oriented device [used] to ensure that immediate possession will be granted." Weaver Enterprises Pet. at 16. It likewise refutes the Joyce Petitioners' argument that lower courts have turned Rule 65 into a "blank check" for the unrestrained exercise of equitable power. Joyce Pet. at 18. Instead, the remedy of immediate possession effected by a Rule 65 injunction is to be determined on a case by case basis, is permitted only after a judicial finding of a substantive right to take and after the movant has met the rigorous requirements for an injunction as set forth in Rule 65, and construing case law. Pet. App. at 25a.

Therefore, the remedy approved by the Fourth Circuit, and the many district courts that have utilized their inherent equitable power to grant immediate possession, is not inconsistent with Congress' decision to withhold the right of quick take power from private companies who are vested with eminent domain power under the Natural Gas Act. Petitioners' argument requires that the Court overlook the substantial difference between quick take power, which involves minimal judicial oversight, and the exercise of inherent equitable power, which requires substantial consideration by the judiciary, including the right to an immediate appeal. 28 U.S.C. § 1292(a)(1).

IV. The Fourth Circuit's Decision Does Not Expand the Use of Equity to Create Rights That Do Not Exist at Law.

The Joyce Petitioners' argument that the Fourth Circuit's decision opens the gateway for judges to legislate new rights in the guise of granting injunctive relief ignores the well-established standards courts utilize to determine whether injunctive relief is appropriate, including a specific finding that a litigant is likely to prevail on the merits of the substantive rights it is asserting. In this case, the Fourth Circuit's decision specifically reiterated and relied on these well-settled injunction standards as set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Selig*, 550 F.2d 189 (4th Cir. 1977). Pet. App. at 30a-34a.

The circular nature of Petitioners' argument is evident. Petitioners assert that the district court created new substantive rights by issuing an injunction to enforce ETNG's legal right to take possession of their property; however, Petitioners do not contest that ETNG does in fact hold this

right. Following the Petitioners' logic, injunctive relief would never be available because the enforcement of an undisputed legal right could never occur until the right is fully adjudicated. Such a result diminishes substantive legal rights instead of creating new rights as suggested by Petitioners.

The Fourth Circuit simply disagreed with Petitioners that immediate possession is a substantive right. The court correctly determined that possession of property might be an appropriate remedy after a judicial finding of a substantive right to take and satisfaction of the rigorous requirements to obtain an injunction. This is not the creation of a new substantive right. If ETNG did not have a substantive right to take pursuant to the Natural Gas Act, it would not be proper to invoke the equitable powers of the court to gain possession of the property.

Finally, the courts below properly determined that the equitable remedy of immediate possession is the appropriate method to protect landowners' interests and facilitate construction of projects deemed to be in the public interest. Without such a remedy, people who simply do not want the project in their backyard could prevent construction of a necessary public project jeopardizing the public good.

V. Petitioners are Only Entitled to Just Compensation for Their Properties.

This Court has recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of non transferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Similarly, the landowner is only "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is *not* entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis supplied); *see also Kirby Forest Indus., Inc.*, 467 U.S. at 10 (landowner is entitled to fair market value of the property on the date of the taking measured by what a willing buyer would pay a willing seller). Price gouging such as that proposed by the Weaver Enterprises Petitioners is contrary to the public interest, undermines the purpose of the power of eminent domain, and is inconsistent with this Court's precedent.

Not surprisingly, the Weaver Enterprises Petitioners fail to cite a single case in support of this putative "right" to negotiate to a higher than fair market value. No "right" exists. Taking their argument to its logical conclusion, every landowner, over 1300 landowners were affected by the Patriot Project, would refuse to negotiate, defend the condemnation complaint, and make every effort to delay the litigation until ETNG was financially forced to abandon the project. Given the capital outlay necessary for a project such as the one at hand ($258 million), public projects deemed necessary by FERC would be abandoned and the country's development of energy infrastructure stymied. Such a result ignores the public's need for natural gas.

CONCLUSION

In light of the foregoing, Ronnie Lynn Goforth and Susan D. Goforth should be dismissed as Petitioners and then these petitions for writs of certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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I. A Conflict Between the Circuits Exists, and a Review of the Fourth Circuit's Opinion Is Necessary to Resolve the Conflict Between the Circuits

ETNG's assertion that no conflict between the Fourth and Seventh Circuits exists is based on its mistaken analysis of the Seventh's Circuit's opinion in Northern Border Pipeline Company v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998). ETNG cannot and did not identify any part of the opinion in Northern Border that distinguishes or reconciles the Seventh Circuit's opinion with the Fourth Circuit's opinion in this case. ETNG asserts that Northern Border is distinguishable because the Northern Border Pipeline Company ("NBPC") "had not obtained an order determining that it had a right to condemn before it sought injunctive relief." Br. in Opp'n at 6. As the Fourth Circuit, however, ETNG can point to no language in the Seventh Circuit's opinion which states that NBPC did not have the right to condemn property for its pipeline or that NBPC had not obtained an order determining that it had the right to condemn the subject property. To the contrary, the court in Northern Border specifically addressed the fact that NBPC had the power to condemn property for its pipeline. What NBPC disavowed was any claim to immediate possession based in substantive law. "On appeal, [NBPC] does not contest the district court's conclusion that its claim to immediate possession has no basis in substantive federal or state law." Northern Border, 144 F.3d at 471. It is the lack of substantive statutory law supporting a claim for immediate possession on which the Seventh Circuit relied and over which the Fourth Circuit glossed.

The Seventh Circuit expressly stated that NBPC had a right to condemn before it sought injunctive relief. The Seventh Circuit correctly noted that a gas company obtains the right to condemn at the moment FERC grants it the power of eminent domain to take property for a particular

project. Id. at 470. "Under the Natural Gas Act . . . issuance of the certificate [from FERC] to Northern Border carries with it the power of eminent domain to acquire the necessary land." Id.

The Seventh Circuit reached a different result than the Fourth Circuit because the Seventh Circuit correctly recognized the difference between the right to take (i.e., the ordinary power of eminent domain or slow-take power) and the additional right to seize immediate possession of property before providing the owner with just compensation (i.e., the extraordinary quick-take power of eminent domain). The gas company in Northern Border possessed the ordinary power of eminent domain, but it did not possess the additional and extraordinary quick-take power. Recognizing this difference, the Seventh Circuit upheld the district court's ruling that "[NBPC] has no legal right to immediate possession under . . . federal substantive law." Id. at 471. The Seventh Circuit explained that while a gas company's right to take property vests when FERC issues it a certificate, a company's "rights to the [owner's] land do not vest when the FERC issues it a certificate." Id. at 472.

Contrary to ETNG's assertions, the Seventh Circuit based its decision on the gas company's "lack of quick-take authority." Id. As that court stated, "[b]ecause [NBPC] disavows any claim that it has a substantive entitlement to the defendant's land right now, rather than an entitlement that will arise at the conclusion of the normal eminent domain process, [NBPC] is not eligible for the [injunctive] relief it seeks." Id. at 471. Because Congress has not granted private gas companies the quick-take power, a gas company's power or right to take possession of the property does not vest until after the conclusion of the eminent domain process and payment of judicially determined just compensation. A reading of Norther Border reveals that any

attempt at distinguishing the Seventh Circuit's opinion in Northern Border from the Fourth Circuit's decision herein is unsupportable.

II. The Jurisprudential Distinction Between a Congressional Grant of the Quick-Take Power and a Judicial Grant of the Quick-Take Power in the Form of an Injunction Is Fundamental to this Appeal

ETNG argues that the district court in this case did not grant the quick-take power because the court granted an injunction. Br. in Opp'n at 13-14. ETNG's argument ignores the purpose, effect, and nature of the injunctive relief granted in this case. In substance, the district court gave ETNG a power and right that Congress had not.

First, the purpose and effect of the injunction granted in this case is identical to that of a congressional grant of the quick-take power—both give the gas company the power and authority to seize possession of an owner's property before providing the owner with just compensation. Second, the court granted powers of eminent domain which belong to Congress. The court, not Congress, thereby prescribed the manner in which ETNG is authorized to exercise its power of eminent domain. While the purpose and effect of the quick-take power and an injunction are similar, the significant difference is that Congress grants the authority or power in one instance and the court grants the authority and power in the other instance. Moreover, a congressional grant of quick-take power does not involve the immediate application of a court's contempt powers as does an injunction.

With the quick-take power, Congress grants a condemnor the power to have immediate possession of property before providing the owner just compensation. See, e.g., 40 U.S.C. § 3114. With an injunction, the court has

granted condemnor the power to seize immediate possession of property before providing the owner just compensation. Br. in Opp'n at 14. With the quick-take power, Congress as the legislative branch of government prescribes the manner in which a gas company must exercise its power of eminent domain. With an injunction, the judicial branch of government prescribes the manner in which a condemnor may exercise its power of eminent domain.

This critical distinction is fundamental to the Petitioners' appeal. Courts are not authorized to grant legislative powers of eminent domain, regardless of the form (i.e., injunction). To hold otherwise ignores the constitutional separation of powers and grants to the judiciary powers that the Constitution vests in Congress.

The Petitioners do not dispute the fact that Congress may grant a condemnor the power to seize possession of property before providing just compensation to the owner. The Petitioners dispute only that courts are not authorized to grant this power. Congress, not courts of equity, determines when a condemnor has the power or right to seize possession of property by the power of eminent domain.

From this Court's earliest opinions upholding a condemnor's power to seize possession before payment of just compensation, this Court has recognized that the legislature must grant this extraordinary power to seize possession of an individual's property before providing just compensation. As this Court acknowledged in Sweet v. Rechel, "it is competent for the legislature, in the exercise of . . . its power to appropriate private property for public uses, to authorize the city to take the fee in the lands . . . prior to making compensation." 159 U.S. 380, 407 (1895) (emphasis added).

Congress has not granted ETNG the quick-take power, which would authorize ETNG to seize immediate possession of the Petitioners' property before providing just compensation to the owner. Although Congress has granted this power to other condemnors, it has withheld this extraordinary power from private gas companies. See, e.g., 40 U.S.C. § 3114. Thus, ETNG's right to seize possession of the Petitioners' property does not vest until after the normal condemnation process and payment of just compensation. See, e.g., Northern Border, 144 F.3d at 471-72. Contrary to ETNG's allegations, the constitutional separation of powers prohibits courts from granting to private gas companies legislative powers of eminent domain, even if such grant is in the form of injunctive relief under Rule 65 of the Federal Rules of Civil Procedure or otherwise.

III. Courts of Equity Are Not Authorized to Invade the Province of the Legislature By Granting Powers Belonging to Congress

ETNG's argument misapprehends the scope of the courts' equitable powers when such powers impinge upon the legislature's exercise of its eminent domain powers. Because Congress has not granted ETNG the quick-take power, ETNG asked the court to use its equitable powers to grant ETNG the quick-take power. ETNG asserts that courts may grant the quick-take power in the form of injunctive relief because "a court will presume the availability of all remedies unless Congress has expressly provided to the contrary." Br. in Opp'n at 8. ETNG's argument fails to contemplate the difference between using equity to craft remedies for existing rights and using equity to create new or non-existing rights or to grant legislative powers of eminent domain.

Here, the court did not simply craft a remedy for an existing right. Instead, the court granted ETNG new powers and rights that Congress had withheld from private gas companies. Congress has not granted ETNG the quick-take power, and, therefore, ETNG asked the court to grant it such power in the form of an injunction.

ETNG further states that this Court "will not lightly assume Congress has stripped courts of their equitable jurisdiction [and that] a departure from equity requires a clear and valid legislative command." Br. in Opp'n at 8. This assertion misapprehends the merits of the Petitioners' position. The Petitioners argue that courts of equity have never had jurisdiction to grant legislative powers belonging to Congress which controls, exercises, and delegates the power of eminent domain. The constitutional separation of powers prohibits courts of equity from granting legislative powers. Instead of asserting that Congress stripped courts of equity of jurisdiction that it once had, the Petitioners assert that, under the Constitution, courts of equity never had jurisdiction, power, or constitutional authority to grant legislative powers of eminent domain.

ETNG relies upon Franklin in which this Court "held that a plaintiff had a private cause of action pursuant to 20 U.S.C. §§ 1681-88 (Title IX) even though a private right of action is not expressly set out in the statute." Br. in Opp'n at 8-9. ETNG states that courts of equity may use equitable remedies even when a statute is silent as to a particular remedy and when the remedy is "not spelled out in the statute." Br. in Opp'n at 8-9. The plaintiff in Franklin had a fully vested right to be free from discrimination based on gender in higher education institutions receiving federal funds, and Franklin did not involve legislative powers belonging to Congress. The power or right that Congress has given ETNG is inchoate under the Natural Gas Act. The power or right of ETNG to take possession of an

individual's property is not ripe until congressionally mandated procedures are completely and thoroughly followed. ETNG continues to gloss over the fact that the case sub judice is an eminent domain case involving constitutional and jurisprudential limitations and circumscription of governmental condemnation power.

Congress has never entrusted the quick-take power of eminent domain to the courts. Under the rationale that ETNG offers and the district court and Fourth Circuit embrace, courts of equity are authorized to grant to condemnors any legislative powers that Congress has not expressly prohibited courts of equity from granting. If in the area of eminent domain law congressional silence is interpreted as an affirmative grant of legislative power to courts of equity, courts may grant any legislative powers that Congress has not expressly prohibited courts from granting. Such an interpretation wreaks havoc on our constitutional structure of government and will have far-reaching implications beyond the purview of eminent domain.

IV. ETNG Fails to Acknowledge the Unique Nature of Eminent Domain

ETNG's argument is fatally flawed because ETNG ignores the rule that eminent domain is a legislative power and that the legislature prescribes the manner and means for the exercise of such power. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). ETNG states that "once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative." Br. in Opp'n at 10. When Congress grants the power of eminent domain to a condemnor, it is true that the condemnor does obtain some discretion as to which property it will take. However, the manner in which the power of eminent domain must be exercised depends exclusively on legislative action. The

legislature always prescribes and controls the manner in which the power of eminent domain must be exercised. It is for this reason that this Court has permitted a condemnor to exercise the quick-take power only when Congress has authorized a condemnor to take property in that manner.

ETNG argues that the Petitioner's reliance on Youngstown is misplaced. Br. in Opp'n at 9. This argument fails. Youngstown demonstrates that even the President of the United States cannot take property through the power of eminent domain except in the manner Congress prescribes. In Youngstown, the President had seized possession of steel mills through an Executive Order. 343 U.S. at 582. The mill owners argued that "the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not the President." Id. Arguing on behalf of the President's actions, Secretary of Commerce, Charles Sawyer, contended that "Congress has taken no action [indicating that it disapproves the President's actions]." Id. at 583. Secretary Sawyer further argued that failure to seize possession of the steel mills "would so endanger the well-being and safety of the Nation that the President had inherent power to do what he had done." Id. at 584.

The President possessed the power of eminent domain. Id. at 585-86; see also 40 U.S.C. § 3113. He sought to seize immediate possession of property because the statute authorizing him to take property was "much too cumbersome, involved, and time-consuming for the crisis which was at hand." Id. at 586. Congress had not authorized the President to seize immediate possession of property in the manner he did. This Court noted that "[t]here is no statute that expressly authorizes the President to take possession of property as he did here." Id. at 585. In fact, Congress had "rejected an amendment which would have authorized such governmental seizures." Id. at 586.

This Court then held that the President was not authorized to seize immediate possession of property as he had in Youngstown because Congress had not authorized the President to take property in the manner he did in that case. Id. at 585, 589. "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." Id. at 588. The Court noted that Congress had the power to authorize the President to seize immediate possession of property for public use, but Congress had not authorized the President to do so.[1] Id. However, because Congress had not authorized the President to seize immediate possession of property, this Court held that he had no authority to do so.

As this Court stated in Youngstown, "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." Id. at 589. Consequently, neither the President nor the courts can usurp the law making power of Congress, including the power to prescribe the manner in which the power of eminent domain is to be exercised by a condemnor to whom Congress has delegated such power. As in Youngstown, Congress has not granted ETNG the quick-take power, which would thereby authorize it to seize immediate possession of property before the conclusion of the condemnation process and payment of just compensation. See, e.g., Northern Border, 144 F.3d at 471-72. The President could not seize immediate possession in the absence of congressional authorization allowing such action, and ETNG is likewise prohibited from taking property in a manner not authorized by Congress.

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[1] "The power of Congress to adopt such policies as those proclaimed by the [President's] order is beyond question." Youngstown, 343 U.S. at 588.

ETNG took exception with the Petitioners' citation of Johnson, which states that "inherent power wielded by life-tenured judges without authorization in statute over the basic functions of a sovereign state simply go too far." See Br. in Opp'n at 11. This statement acknowledges that federalism prohibits judges from using equity to improperly invade the province of the states. Likewise, the constitutional separation of powers prohibits judges from using inherent equitable powers, without authorization in statute, to invade the province of Congress. The fundamental danger to the principles of federalism that Johnson identifies is equally a threat to preserving the separation of powers under the Constitution. The Fourth Circuit's decision makes the danger all the more real.

Conclusion

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Petitioners respectfully submit that this Court should grant their Petition for Writ of Certiorari.

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